March 29 1872

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~152.~~ 157

JAMES BIGLER, APPELLANT,

vs.

WILLIAM WALLER AND ROBERT SAUNDERS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF VIRGINIA.

FILED DECEMBER 7, 1870.

April 14 1872

[illegible]

SUPREME COURT OF THE UNITED STATES.

No. 352.

JAMES BIGLER, APPELLANT,

vs.

WILLIAM WALLER AND ROBERT SAUNDERS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF VIRGINIA.

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1 *Bond on appeal.*

Supreme Court of the United States.

JAMES BIGLER
vs.
WILLIAM WALLER & ROBERT SAUNDERS.

Know all men by these presents that we, Samuel P. Brown, of Washington County, D. C., and George H. Plant, of Washington City, D. C., are held and firmly bound unto the above-named William Waller and Robert Saunders, in the sum of twenty-thousand dollars, to be paid to the said Waller and Saunders, their executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this 7 day of June, 1870.

Whereas the above-named James Bigler hath prosecuted an appeal to the Supreme Court of the United States, to reverse the decree rendered in the above-entitled suit by the Supreme Court of the United States:

Now, therefore, the condition of this obligation is such, that if the above-named James Bigler shall prosecute his said appeal to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

SAMUEL P. BROWN. [SEAL.]
GEORGE H. PLANT. [SEAL.]

Sealed and delivered in the presence of—
J. K. HAYWOOD.

Approved.

S. P. CHASE,
Chief Justice U. States.

(Indorsed:) U. S. circuit court, fourth circuit, dist. of Virginia. James Bigler, appellant, vs. William Waller et al., respondents. Bond on appeal. J. K. Haywood, sol. for appellant.

2 UNITED STATES OF AMERICA, *ss:*

To William Waller and Robert Saunders, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday of December next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of Virginia, wherein James Bigler is plaintiff and you are defendants in error, to show cause, if any there be, why the decree in the said suit mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 7th day of June, in the year of our Lord one thousand eight hundred and seventy.

S. P. CHASE,
Chief Justice of the Supreme Court of the United States.

3 I hereby acknowledge service of the within citation. James Alfred Jones, counsel for the defendants in this cause, in the circuit court of the United States for the district of Virginia.

JAMES ALFRED JONES.

OCTOBER 10TH, 1870.

(Indorsed:) U. S. circuit court, fourth circuit, district of Virginia. James Bigler, appellant, vs. William Waller et al., respondents. J. K. Hayward, sol. for appellant, 229 Broadway, N. Y. Citation.

4 UNITED STATES OF AMERICA,
District of Virginia, to wit:

Pleas and proceedings before the circuit court of the United States for the district of Virginia, held at the city of Richmond, in said district, on the 3d day of June, in the year of our Lord one thousand eight hundred and seventy.

Be it remembered that, heretofore, to wit, at the city of Norfolk, in said district, on the 16th day of June, A. D. 1866, came James Bigler, by his counsel, and filed his "bill in equity" against William Waller and Robert Saunders; which said bill, together with the exhibits therein referred to, are in the words and figures following, to wit:

5 *Bill of complaint.*

To the judges of the circuit court of the United States for the district of Virginia.

James Bigler, of Newburg, and a citizen of the State of New York, brings this his bill against William Waller and Robert Saunders, of the city of Williamsburg, and citizens of the State of Virginia.

And therefore your orator complains and says that, on the second day of April, 1853, while he then was, as he now is, a citizen of the said State of New York, he, through his agent, F. W. Hammond, entered into an agreement with said William Waller, then and now a citizen of the State of Virginia, for the purchase of a tract of land lying in the county of York, in the said State of Virginia, of which agreement a copy is herewith filed, marked A, and prayed to be taken as a part of this bill; that, on the 10th day of May, 1853, said Waller executed to your orator a deed for said real estate, a copy of which is herewith filed, marked B,

6 and prayed to be taken as a part of this bill; that, on the last-named day your orator made the cash payments to said Waller for said real estate, and executed his obligation to him, the said Waller, for the balance of the purchase-money for the said estate, a copy of which obligation is herewith filed, marked C, and prayed to be taken as a part of this bill; that on the 22d day of June, 1853, your orator executed a trust deed of said real estate to Robert Saunders, who was then, and is now, a citizen of the said State of Virginia, as trustee, to secure to said Waller the payment of the money due by said obligation marked C. A copy of said trust deed is herewith filed, marked D, and prayed to be taken as a part of this bill. That your orator, having complied with his part of said agreement, was then put in possession of said real estate, and erected and put upon the same a large hotel, a large saw-mill, a grist-mill, and other large buildings, a brick-yard, a large wharf extending some three-fourths of a mile into the York River, and made other valuable improvements too numerous to mention, at a cost

of about $150,000; that your orator then and thereafter made
7 contracts for large sales of portions of the said estate, under said agreement, marked A, and tendered to said Waller such proceeds of said sales, sufficient to afford ample security for the liquidation of the said part of the residue of the debt, for the purchase-money then due, when he, the said Waller, declined to ratify the said sales, and prevented your orator from making large profits therefrom, and thereby greatly damaged your orator, to the amount of $25,000; that your orator continued to make the payments due by said obligations until April, 1861, when the war broke out and forced your orator to leave the State of Virginia; that your orator is informed and believes that, shortly after he left said State of Va., about Sept'r 1st, 1861, the said Waller authorized said Saunders, as said trustee, to make sale of said real estate, which sale the said Saunders effected without publishing the notice required by said deed, and that said Saunders, out of the proceeds of said sale of said estate, satisfied said bond of your orator, marked C, and
8 has failed to pay over or account to your orator for the balance of said purchase-money of said estate, and said Waller became the purchaser of said estate under said sale, and at once took possession of the same, and all the property thereon, consisting of that already named, together with a great number of horses and mules, farming implements, to the value of five thousand dollars at least, and converted the same to his own use, and sold and applied the proceeds of the same to the payment of the said debt due on said obligation; and that the said Waller also gathered and sold large quantities of fruits from the orchard on said estate, sawed millions of feet of lumber in said mill, which he sold to the confederate government, and received therefor large am'ts of money, and rented out said hotel to the confederate government as a hospital, & receiv*ing* as rent therefor large sums of money, and applied the monies arising from all said sales and said rents in discharge of said bond; that your orator should be entitled to a credit on said bond from said sales and rents, use and occupa-
9 tion of said lands, which, when accounted for, will more than satisfy the several sums alleged to be due on the same; that said Waller enjoyed the possession of said real estate from 1861 until the 30th of April, 1865, and during that period succeeded in getting the military commanders of the confederate forces in that vicinity to wantonly destroy said wharf and said mill and other buildings of great value on said estate, to enable him, the said Waller, to receive a large compensation therefor from the said confederate government, which he received, as your orator is informed and believes, to the amount of $25,000, the value of the same; that your orator also charges that said Waller sold, or agreed to sell, said real estate to P. W. Grubbs and Jones, of the city of Richmond, in 1863, or at some other subsequent time during the war; that, about the last of May, 1865, your orator went on to the said State of Virginia and saw said real estate, and found it to be in a ruinous condition, and succeeded, through the United States military authorities, in recovering possession there-
10 of; that the said Waller, finding that his efforts to continue to cheat and defraud your orator in the manner aforesaid would prove fruitless, about the 11th day of November, 1865, instituted a suit against your orator on his obligation, marked C, in the supreme court of the city and county of New York, to recover what he claimed to be due thereon, a copy of the proceedings in which are herewith filed, marked E, and prayed to be taken as a part of this bill; that your orator is *as* willing to abide the issue of said suit, but the said Waller seems de-

sirous to avoid the same, and that about two weeks ago your orator learned, through his agent on said real estate in the State of Virginia, that said Robert Saunders, trustee, had posted up a notice in writing in the said county of York, to the effect that he would, at the request of said Waller, in a few weeks, sell said real estate; that your orator at once employed J. K. Hayward, esq'r, as his attorney, to go on to the said county of York, in the said State of Virginia, who says that he had an interview with said Saunders in regard to making said sale, and called his attention to the fact that the deed of trust, marked D, required
11 him to give sixty days' notice in newspapers in Richmond and in the city of New York before he could lawfully sell said estate, and that said Saunders informed him, said Hayward, that he would not advertise said sale in the papers as aforesaid, but intended to sell the said real estate after posting the notice at Yorktown, which he showed the said Hayward, a copy of which is herewith filed, marked "E," and prayed to be taken as a part of this bill.

And your orator believes and charges that said Waller is insolvent and desires and will induce the said Saunders so to act in regard to said sale in a partial and unjust manner so as to cheat and defraud your orator; that, if said Saunders shall sell said property and pay said Waller the proceeds of said sale, your orator will be unable to recover the monies which the said Waller so unjustly obtained as aforesaid; that said Waller, by his efforts to have said property sold without notice according to the deed, and therefore without regard to law, while his action is depending in the supreme court of the city and county of New York, evinces a full determination to evade the
12 payment of said debts due by him, as well as to force your orator into the courts of the State of Virginia, where the said sale took place during the war, would be recognized as valid under the laws thereof recognizing as valid all acts and legal proceedings done during the late war, and also by the stay law of the said State of Va., prevents your orator from availing himself of his claim of offsets while he, the said Waller, could collect his alleged debt due on said bond. In tender consideration whereof, and forasmuch as your orator is remediless in the premises by the strict rules of the common law, and cannot have adequate relief except in a court of equity, where matters of this kind are properly cognizable and relievable: To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their corporate oaths, and according to the best and utmost of their knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to each of the several interrogatories hereinafter mentioned and set
13 forth, as by note hereunder written they are required to answer, that is to say—

1st. Whether or not you, Robert Saunders, made sale of the real estate in the bill and proceedings mentioned in the year 1861, or at any time thereafter during the war; and if so, who was the purchaser thereof, and at what price.

2nd. Did you or not make a conveyance of said real estate to the purchaser thereof, and with the purchase-money satis*fied* said bond or obligation, marked C.?

3rd. Did you advertize said sale, according to the terms of the said deed, in the papers of Richmond and New York?

4th. Did or not the purchaser take possession of said real estate under said sale?

5th. Whether or not you, Robert Saunders, offered to sell said real

estate by posting notice in writing to that effect in Youkto[illegible] county of York, in the State of Virginia, and without adver[illegible] same in the papers of Richmond and New York City, as re[illegible] said deed of trust, marked D, during the month of May or June, 1866?

14 6th. Did or not you, William Waller, offer to, or contract to, sell said real estate to one Peter W. Grubbs, and Jones, in the city of Richmond, in 1863, or at any other time during the late war?

7th. Do you know, or can you set forth any other matter or anything which may be a benefit or advantage to the plaintiff in this cause?

And that the defendant, Robert Saunders, may be enjoined and restrained from selling the said real estate or any part thereof; and that the said William Waller may be enjoined and restrained from selling, transferring, or assigning his interest in said obligation until said action in the supreme court of N. Y. is determined, or until the matter is referred to one of the masters of this honorable court, to take an account of the rents and sales made by the defendant Waller, and an enquiry of the damage done by the said Waller to the property of your orator, and whatever is found due your orator may be decreed to be paid him, and that all proper offsetts may be allowed him; that the said defendants may be required to deliver up all deeds or papers in
15 their possession concerning said sales, and that your orator may have such further and other general relief in the premises as the nature of his case may require or to equity shall seem meet.

May it please this hon. court to grant a writ of subpœna directed to the marshal of the district of Virginia, and commanding the said William Waller and Robert Saunders to appear and make answer unto this bill of complaint and perform, and abide by such orders and decrees herein as to the court may seem requisite by the principles of equity and good conscience; and your orator will ever pray.

J. K. HAYWARD.

MEMO.—Robert Saunders and William Waller are required to answer all the interrogatories numbered connectively 1, 2, 3, 4, 5, 6, & 7.

J. K. HAYWARD,
240 *Broadway, N. Y.*

16 I, J. K. Hayward, attorney in this suit, depose and say that all the facts stated in this bill of injunction are true, except as to those matters stated on information and belief, and as to those matters he believes to be true, having derived the information from the complainant.

J. K. HAYWARD.

Subscribed and sworn to this 14th day of June, 1866, before me.

JOHN C. UNDERWOOD,
Judge, &c.

The clerk of this court will issue the writ and injunction prayed for in the foregoing bill.

JOHN C. UNDERWOOD,
Judge, &c.

(Indorsed:) Bill of complaint.

17 EXHIBIT "A."

This memorandum of a contract made and entered into on this second day of April, 1853, between William Waller, of the State of Va., and Mr. James Bigler, of Newburg, State of N. Y., through his agent, F. W. Hammond, of the second part, witnesseth that the said Waller agrees to sell the said Bigler the estate of said Waller for the sum of thirty thousand dollars ($30,000) on the following terms, to wit: three thousand dollars before conveyance is made; the second payment at the expiration of two years, two thousand dollars or more, at the option of the purchaser; and annually thereafter one thousand dollars or more, at the option of the purchaser, until the whole shall have been paid; the time for the liquidation of the whole amount not to exceed ten years. It is also agreed that the said Waller will allow said Bigler to sell such portion of the land as he may see fit from time to time, the said Bigler paying over to the said Waller such proceeds of the sales as will afford ample security for the liquidation of the residue of the debt due for the purchase of said estate from said Waller. It is also agreed that the crops now on the land shall be included in said sale, and be reaped by said Waller, provided said Waller does not sell his slaves to leave the estate before the time of harvest arrive.

18 Given under our hands & seals this second day of April, one thousand eight hundred and fifty-three.

WILLIAM WALLER. [SEAL.]
F. W. HAMMOND, [SEAL.]
For J. Bigler.

Teste:
H. M. WALLER.

It is understood by the contracting parties that interest on the purchase money shall not commence to run until conveyance is made.

WILLIAM WALLER. [SEAL.]
F. W. HAMMOND. [SEAL.]

Teste:
H. M. WALLER.

19 (Indorsed:) Exhibit "A." Filed June 16, 1866. W'm H. Barry, clerk, p'r J. P. Hodges, dep.

20 EXHIBIT "B."

This deed, made the tenth day of May, in the year eighteen hundred and fifty-three, between William Waller, of Williamsburg, in the State of Virginia, and James Bigler, of Newburgh, in the State of New York, witnesseth: That, in consideration of the sum of thirty thousand dollars, paid or secured by the said Bigler to the said Waller, the said William Waller doth grant unto the said James Bigler a certain tract of land in the county of York, in the State of Virginia, known as Ripon Hall, containing about twenty-four hundred acres, more or less, (the sale being in gross and not by the acre,) and bounded as follows: North by York River; east by the lands of Littleton Waller Tazewell and of William L. Henley; south by the lands of John Blassingham and of Robert P. Waller; and west by the land of Robert P. Waller and by the creek dividing the said tract, called Ripon Hall, from the land known as Cappahosie. And the said William Waller doth hereby covenant with and to the said James Bigler that he, the said William Waller, will warrant generally

the property hereby conveyed to the said James Bigler, his heirs, and assignees forever.

21 Witness the following signature and seal.

WILLIAM WALLER. [SEAL.

Teste:

F. W. HAMMOND.

VIRGINIA, CITY OF WILLIAMSBURG, *sct:*

I, P. T. Powell, a justice of the peace for the corporation aforesaid, in the State aforesaid, do certify that William Waller, whose name is signed to the writing hereto annexed, bearing date on the 10th day of May, 1853, has acknowledged the same before me, in my corporation aforesaid. Given under my hand this 11th day of May, 1853.

P. T. POWELL, *J. A. P.*

In York County court clerk office, the 2nd day of August, 1853, this deed was produced, and with the certificate of the acknowledgement by William Waller, party thereto, before a justice of the city of Williamsburg thereon endorsed, admitted to record.

Teste:

BOLIVAR SHEILD, *Cl'k.*

A copy.—Teste:

BOLIVAR SHEILD, *Cl'k.*

75c.

22 (Indorsed:) Exhibit "B." Filed June 16, A. D. 1866. W'm H. Barry, cl'k, p'r J. P. Hodges, dep.

23 EXHIBIT "C."

[$25,000 00.]

This paper witnesseth that I, James Bigler, of the State of New York, a resident of Newburgh, in that State, *and* indebted to William Waller in the sum of twenty-five thousand dollars, which I promise to pay within two years after this date, and at the periods of time specified in a contract drawn up and signed by myself, through my agent, F. W. Hammond, and by William Waller, in his own behalf; and I further promise and bind myself and legal representatives to pay interest on this debt of twenty-five thousand dollars, at the rate of six per centum per annum, punctually at the expiration of each year.

Witness my hand & seal this tenth day of May, one thousand eight hundred and fifty-three.

J. BIGLER. [SEAL.]

(Indorsed:) Exhibit "C."

24 EXHIBIT "D."

This deed made the twenty-second day of June, in the year eighteen hundred and fifty-three, between James Bigler, of Newburgh, in the State of New York, and Harriet E. Bigler, his wife, of the one part, and Robert Saunders, of Williamsburg, in the State of Virginia, of the other part, witnesseth: That the said James Bigler and Harriet E., his wife, do grant unto the said Robert Saunders, the following property, to wit: A tract of land in York County, Virginia, called Ripon Hall, which

tract of land is described in a deed dated on the 10th day of May, 1853, from William Waller, of Williamsburg, in Virginia, to the said James Bigler, (which deed is recorded in the court of the said county of York, and to which deed reference is made for the description,) in trust to secure to the said William Waller the purchase-money remaining due for the said tract of land, which purchase-money so due is twenty-five thousand dollars, payable according to the contract between the said Bigler and the said Waller, as follows, to wit: Two thousand dollars (or more at the option of the purchaser,) at the expiration of two years from the tenth of May, 1853, and annually thereafter one thousand dollars, (or more, at the option of the purchaser,) until the whole twenty-five thousand dollars shall be paid, it being, however, distinctly
25 understood, *however*, that the whole of the said amount of twenty-five thousand dollars is to be paid within, or at the expiration of ten years, from the 10th of May, 1853, so that whatsoever sum shall remain unpaid on the 10th of May, 1863, shall then be due and payable to the said Waller by the said Bigler. It is understood further, that the interest, at the rate of six per centum per annum, which may be due at the end of any and every year, on the whole principle amount then due shall be paid at the end of such year, and that otherwise such a defalcation shall be considered to have been made by the said Bigler as shall authorize the said Waller to require the said Saunders to execute this trust according to law. And the said James Bigler doth covenant to and with the said Robert Saunders, that he, the said Bigler, will warrant generally the property hereby conveyed to the said Robert Saunders, his heirs, and assignee forever. It is further understood that a failure on the part of the said Bigler to pay the sum of two thousand dollars at the least, with interest upon the remainder as well as upon the two thousand dollars, on the 10th day of May, 1855, or a like failure to pay at least one thousand dollars annually thereafter, with in-
26 terest as aforesaid, shall be considered a defalcation on the part of the said Bigler, at any one of the periods referred to, as shall a failure to pay the amount remaining due on the 10th day of May, 1863, with interest; and that any such defalcation occurring at any one of the periods mentioned shall be sufficient to authorize the said Waller to require the said Saunders to execute this trust according to law. Witness the following signatures and seals.

J. BIGLER. [SEAL.]
HARRIET E. BIGLER. [SEAL.]

It is understood, and this addition was made before the execution of this deed, that in case of a sale the trustee shall give sixty days' notice in newspapers in Richmond & in the City of New York.

RO. SAUNDERS, *Trustee.* [SEAL.]

STATE OF NEW YORK,
Orange County, sct:

We, the undersigned, two of the justices of the peace of the town of Newburgh, for the county of Orange, in the State aforesaid, do certify that James Bigler, whose name is signed to the writing hereto annexed, bearing date on the 22d day of June, 1853, has acknowledged the same before us in our presence aforesaid. Given under our hands this
27 28th day of June, 1853.

C. F. BELKNAP,
Justice of the Peace in & for Orange Co., N. Y.
STEPHEN C. PARMENTER,
Justice of the Peace in & for Orange County.

STATE OF NEW YORK,
Orange County, sct:

We, Chauncey F. Belknap and Stephen C. Parmenter, two of the justices of the peace of Orange County, residing in Newburgh, in said county, do certify that Harriet E. Bigler, the wife of James Bigler, whose names are signed to the writing hereto annexed, bearing date on the 22nd day of June, 1853, personally appeared before us in Newburgh aforesaid, in the State aforesaid, and being examined by us privily and apart from her husband, & having the writing aforesaid fully explained to her, she, the said Harriet E. Bigler, acknowledged the said writing to be her act and declared that she had willingly executed the same and does not wish to retract it. Given under our hands this 28th day of June, 1853.

C. F. BELKNAP,
Justice of the Peace in & for Orange County, N. Y.
STEPHEN C. PARMENTER,
Justice of the Peace in & for Orange County, N. Y.

STATE OF NEW YORK,
Orange County clerk's office, ss:

I, Nathan Westcott, clerk of the county of Orange, do hereby
28 certify that Chauncey F. Belknap & S. C. Parmenter, whose names *is* subscribed to the certificate of the proof or acknowledgement of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgement, justices of the peace for said county, dwelling in said county, elected and sworn and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such justices and verily believe that the signatures to the said certificate of proof or acknowledgement is genuine, and that said instrument is executed and acknowledged or proved according to the laws of this State, and the same is sufficient to allow it to be recorded in this State.

In testimony whereof I have hereunto set my hand and affixed the seal of the said county, the 28th day of June, 1853.

[SEAL.] N. WESTCOTT, *Clerk.*

In York County court clerk's office the 2nd day of August, 1853, this deed of trust was produced, and, with the several certificates thereon endorsed of its acknowledgement and privy examination by James Bigler and Harriet E. Bigler, his wife, admitted to record.

Teste: BOLIVAR SHEILD, *Cl'k.*

29 A copy.—Teste:

BOLIVAR SHEILD, *Cl'k.*

VIRGINIA,
York County, to wit:

I, Bolivar Sheild, clerk of the county & State aforesaid, do certify that there has been, so far as appears from the archives of my office, no report of sale by the trustee under this deed. Given under my hand & seal of office this 8th June, A. D. 1866.

BOLIVER SHEILD, *Cl'k.*

30 (Indorsed:) Exhibit "D." Filed June 16, 1866. W'm H. Barry, clerk, p'r J. P. Hodges, d'ty.

31 EXHIBIT "E."

Supreme court, city and county of New York

WILLIAM WALLER, PLAINTIFF,
against
JAMES BIGLER, DEFENDANT.

The plaintiff, replying to the answer of the defendant herein, alleges, as follows:

As to the first counter-claim in said answer set forth, plaintiff says he has not knowledge or information sufficient to form a belief as to the truth of the allegations in folios 7 and 8 in said answer, in respect to said defendants' alleged agreements and bargains to all *to* the persons named in said answer, or to any one else, any portion or portions of said estate or lands referred to in the complaint and answer.

And plaintiff denies that said defendant, in respect to either of said alleged sales, ever offered to pay or tendered to this plaintiff such sum or sums, as would have afforded ample security to the plaintiff for the liquidation of the residue of the debt for the purchase of said estate.

32 And plaintiff denies that he did, in violation of the contract between plaintiff and defendant in respect to said land, refuse to allow said defendant to sell any portion of said land, if said defendant would comply with the conditions of said contract.

And plaintiff further says he has no knowledge or information sufficient to form a belief, as to whether, by means of any such supposed and alleged refusals on his part, the defendant suffered any loss of profits or damages whatever, and plaintiff denies that defendant did suffer any damage, or loss of any profits in respect to the matters set up in said counter-claim by reason of any wrong or default on the part of this plaintiff, or that defendant ever incurred, in said matter, in respect to said supposed losses of profits, and said damages, damage in the sum of twenty-five thousand dollars, or in any other sum.

As to the second counter-claim set forth in said answer, plaintiff says that when the bond of the defendant, set forth in the complaint herein, was executed, it was subsequent to the delivery by this plaintiff to said defendant of a deed for the land referred to in said complaint, although it was on the same date, and at the same interview.

And plaintiff further alleges that the said defendant, at the time of delivering said bond, also delivered to Robert Saunders a duly-executed deed of trust on said land to secure the payment of said bond, as alleged

33 in said counter-claim, and plaintiff says that he has not the original nor copy of said deed of trust, but upon information and belief in respect thereto, he denies that, in said deed of trust, it was provided that to entitle the said trustee to foreclose the lien on said land, created by said deed, a written notice should be given to the defendant of the foreclosure proceedings, or that a notice thereof should be published in a newspaper in the city of New York for sixty days prior to any sale under such foreclosure. And plaintiff, further replying, denies that there have been any illegal proceedings by him or for his account to his knowledge or belief, under said deed of trust, and he denies all of the allegations in said answer herein, beginning at the first of folio 14 in the said answer, and to the close of the second counter-claim in said answer, and he denies that he damaged the defendant in respect to the matters set out in said counter-claim in the sum of seventy-five thousand dollars or in any sum.

For a further reply plaintiff says, in respect to the third counter-claim contained in said answer, that he admits that said defendant erected various buildings and improvements on said land, but plaintiff has no knowledge or information sufficient to form a belief in respect to the expense of said buildings and improvements. And as to the other allegations in said counter-claim plaintiff denies each and every one, except that he admits that, during a part of the period referred to, he,
34 said plaintiff, served in the army of the late Confederate States in the late war between them and the United States, and that the plaintiff served, as aforesaid, to the best of his ability, in accordance with the laws of war. But plaintiff explicitly denies all knowledge of, privity to, or any personal connection with, or agency in, any of the alleged injuries, destruction and damage to the personal property of the said defendant.

And plaintiff further alleges that he has, before the commencement of this action, received from the Government of the United States pardon and amnesty, in accordance with law, for his participation in said war, and that he is relei*v*ed from all disability, at law, by reason of anything done in said military service as aforesaid.

Wherefore said plaintiff prays for judgment herein, in accordance with his complaint, and that said counter-claims be dismissed, and for his costs.

ALGERNON S. SULLIVAN,
Att'y for Plaintiff.

CITY AND COUNTY OF NEW YORK, *ss:*

Algernon S. Sullivan, being duly sworn, says that he is the attorney for the plaintiff in the above-entitled action; that the foregoing reply is true of his own knowledge, except as to the matters therein stated
35 on information and belief, and as to those matters he believes it to be true; that the reason why the verification is not made by the plaintiff is, that the plaintiff does not reside in, nor is he now within this State, and that ground of affiant's belief as to the allegation set forth in the foregoing reply are papers pertaining to the subject of this action, and written communications received by affiant from the plaintiff *are* in respect to the matters and things involved in this action, and which papers and written communications are in deponent's possession.

ALGERNON S. SULLIVAN.

Sworn to before me this 21st day of March, 1866.

JOHN A. FOLEY,
Notary Public.

36 (Indorsed:) N. Y. supreme court. W'm Waller ag'st James Bigler. Answer.

37 *Summons.—For a money demand on contract.*

[U. S. rev. stamp 50 cents cancelled.]

Supreme court, city and county of New York.

WILLIAM WALLER, PLAINTIFF,
against
JAMES BIGLER, DEFENDANT.

To the defendant above-named:

You are hereby summoned and required to answer the complaint in

this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscriber at his office, No. 29 Wall street, in said city of New York, within twenty days after the service hereof, exclusive of the day of such service; and if you fail to answer the complaint within the time aforesaid, the plaintiff in this action will take judgment against you for the sum of thirteen thousand dollars with interest from the tenth day of May, one thousand eight hundred and sixty, besides the cost of this action.

Dated November 11th, 1865.

ALGERNON S. SULLIVAN,
Plaintiff's Attorney, 29 Wall st.

38 Supreme court, city and county of New York.

WILLIAM WALLER
against
JAMES BIGLER.

The above-named plaintiff complains of the above-named defendant, and says that, on the tenth day of May, A. D. 1853, the said defendant made his certain bond or writing obligation, sealed with his seal and in the words and figures following, to wit:

"$25,000 00.

"This paper witnesseth that I, James Bigler, of the State of New York, a resident of Newburgh, in that State, am indebted to William Waller in the sum of twenty-five thousand dollars, which I promise to pay within ten years after this date, and at the periods of time specified in a contract drawn up and signed by myself through my agent, Mr. H. Hammond, and by William Waller in his own behalf; and I further promise and bind myself and legal representatives to pay interest on this debt of twenty-five thousand dollars, at the rate of six per centum per annum, punctually at the end of each year.

"Witness my hand and seal this tenth day of May, one thousand eight hundred and fifty-three.

"J. BIGLER." [SEAL.]

39 And plaintiff further alleges that, by the terms of the contract mentioned in said bond, it was specified and agreed that the said defendant would pay the said amount of twenty-five thousand dollars at the periods of time and in the instalments as follows, viz: That, until the tenth day of May, A. D. 1863, one thousand dollars of principal and the accrued annual interest at the rate of six per centum per annum on the entire unpaid balance of principal of said debt should be paid by said defendant on the tenth day of May of each and every year, but that, on the said tenth day of May, A. D. 1863, the balance of said principal debt then remaining unpaid, and the accrued interest, should be all paid by said defendant.

And the plaintiff further alleges that the said bond was executed and delivered by said defendant to said plaintiff as a part of the consideration for the purchases of a tract of land which plaintiff had sold and conveyed to him.

And plaintiff further alleges that, subsequent to the execution and delivery of said writing obligation, from time to time said defendant made payments of principal and interest thereon, so that, on the tenth day of May, A. D. 1861, there was due and unpaid, on account
40 of said principal debt, the sum of thirteen thousand dollars, and

interest thereon for the period of one year last past. And plaintiff alleges that, although payment thereof has often been requested, no part of said sum of thirteen thousand dollars, nor of the interest due thereon, has been paid; but that said sum of thirteen thousand dollars, with interest thereon from the tenth day of May, A. D. 1860, and interest on each annual instalment of interest from the time it became due, is justly due to said plaintiff by said defendant.

Wherefore the plaintiff demands judgment against said defendant for said sum of thirteen thousand dollars, with interest thereon from the tenth day of May, 1860, besides the cost of this action.

ALGERNON S. SULLIVAN,
Pl'tf's Att'y, 29 *Wall St.*

41 CITY AND COUNTY OF NEW YORK, *ss:*

Before me personally came William Waller, the plaintiff above named, who, having first been duly sworn, makes oath and says that the foregoing complaint is true, except as to the matters stated on information and belief, and as to those matters he believes it to be true.

W'M. WALLER.

Sworn before me this 11th day of November, 1865.

J. SOLES RITTERBAND,
Notary Public New York County.

(Indorsed:) Supreme court. William Waller vs. James Bigler. Complaint and summons. A. S. Sullivan, pl't'f's att'y.

42 *Answer of defendant.*

Supreme court of the State of New York, city and county of New York.

WILLIAM WALLER
ag'st
JAMES BIGLER.

The answer of the defendant above named to the complaint of the plaintiff in this action:

First. For a counter-claim in this behalf existing, in favor of said defendant and against said plaintiff, arising out of the contract or transaction set forth in the complaint, and also connected with the subject of this action, this defendant states:

1. That, on or about the second day of April, 1853, a contract, in writing and dated on that day, was executed by and between the said plaintiff and the said defendant, under their respective hands and seals, (the same being executed for the defendant by F. W. Hammond, his attorney-in-fact thereto duly authorised,) and which contract in writing, thus executed, was immediately, upon such execution, duly delivered by each of the parties thereto, and became thereupon of full force and effect; and of which contract in writing the *foregoing* is a copy, to wit:

(Copy.)

This memorandum of a contract, made and entered into on this second day of April, 1853, between William Waller, of the State of

43 Va., and Mr. James Bigler, of Newburg, State of N. Y., through his agent, F. W. Hammond, of the second part, witnesseth: That the said Waller agrees to sell to said Bigler the estate of said Waller for the sum of thirty thousand dollars, ($30,000,) on the following terms, to wit: Three thousand dollars before conveyance is made; the second payment, at the expiration of two years, two thousand dollars or more, at the option of the purchaser; and annually thereafter, one thousand dollars or more, at the option of the purchaser, until the whole shall have been paid, the time for the liquidation of the whole amount not to exceed ten years. It is also agreed that the said Waller will allow said Bigler to sell such portions of the land as he may see fit from time to time, the said Bigler paying over to the said Waller such proceeds of the sale as will afford ample security for the liquidation of the residue of the debt due for the purchase of said estate from said Waller. It is also agreed that the crops now on the land shall be included in said sale and be reaped by said Waller, provided said Waller does not sell his slaves to leave the estate before the time of harvest arrives.

Given under our hands and seals this second day of April, one thousand eight hundred and fifty-three.

WILLIAM WALLER. [SEAL.]
F. W. HAMMOND, [SEAL.]
For J. Bigler.

Teste:
H. M. WALLER.

44 It is understood by the contracting parties that interest on the purchase-money shall not commence to run until conveyance is made.

WILLIAM WALLER. [SEAL.]
F. W. HAMMOND. [SEAL.]

Test:
H. M. WALLER.

That the said contract in writing, of which a copy is above set forth, is the same contract mentioned in the bond or writing obligatory set forth in the complaint, and contained mutual stipulations and covenants; that one of the stipulations and covenants therein contained to be observed and kept by and on the part of the said plaintiff is the following, to wit: It is also agreed that the said Waller will allow said Bigler to sell such portions of the land as he may see fit, from time to time, the said Bigler paying over to the said Waller such proceeds of the sales as will afford ample security for the liquidation of the residue of the debt due for the purchase of said estate from said Waller; that after the execution and delivery of said contract and of the said bond or writing obligatory, and while the said contract was in full force and effect, the said defendant bargained and agreed to sell to several persons, respectively, portions of the said estate or land, to wit: in the year 1854,
45 a certain portion of about three or four acres to Capt. John Sterling, at the price of 300$ per acre; and thereafter another portion to one Capt. Johnson, and thereaftero ther portions to other parties, at proper and advantageous prices therefor and thereupon, and in respect of each and every of said sales, the defendant made due and repeated application to the plaintiff to be allowed to perfect and carry out said sales respectively, offering to pay over to the plaintiff the whole proceeds of such

sales, and to pay to the plaintiff such sums as would afford ample security with his lien on the residue of the land for the liquidation and payment of the residue of the said debt due to the plaintiff, but the said plaintiff, arbitrarily and contrary to, and in violation of the terms, as well as the tenor and meaning of the said contract in writing, absolutely refused to consent, or to allow his trustee to consent to said sales, or to any sales of any portion or portions of said estate or land, or to allow the defendant to make or effectuate any sale or sales of any portion or portions thereof whatever. By means thereof, the defendant lost and was deprived of the moneys, profits, and advantages which he would have derived
46 from said sales, and was also compelled to desist from attempting or making any sales of portions of said lands, as it was by said contract agreed he might do, and whereof the defendant suffered damages, which, with said profits and advantages to which he was entitled, and of which he was deprived as aforesaid, amount to more than twenty-five thousand dollars. And for which sum the defendant demands judgment against the plaintiff in this action.

2. For a further counter-claim in this behalf as aforesaid, the said defendant states that, at the time of the execution and delivery of the said bond or writing obligatory set forth in said complaint, the plaintiff executed and delivered to the defendant a deed of conveyance of said premises, and the defendant simultaneously, and at the request of the plaintiff, executed and delivered to one Robert Saunders a trust-deed of said premises, as collateral security to the said bond or writing obligatory, which trust-deed has been, as defendant is informed and believes, burnt and lost, and in which trust-deed it was among other things provided and contained that to entitle the said trustee to foreclose the lien on said premises, created thereby for the benefit of said plaintiff, a
47 written notice should be given to the defendant of the proceedings to foreclose said lien, and should be published in a newspaper published in the city of New York, for at least sixty days prior to such foreclosure, and prior to any sale of the premises under such foreclosure. That no such notice was ever given or published by the said plaintiff or his said trustee, nor any legal or valid foreclosure of said lien or sale of said premises thereunder ever had. Yet the said plaintiff untruly pretending and asserting that there had been a legal and valid foreclosure of said lien, and taking advantage of the disloyal and riotous disposition and practices of himself and neighbors in the vicinity of said premises, unlawfully and without any authority of law, went on said premises with his agents and abettors, and drove away and ejected therefrom the agents and tenants of the defendant, and placed his own agents and tenants thereon. Whereby the defendant was for a long time deprived of the possession and enjoyment of the said premises and of the rents thereof, whereby a grist mill and a portion of a dock thereon were burnt and destroyed, and other destruction and damage occasioned, to the damage of the said defendant of at least seventy-five thousand dollars, and for which sum the said defendant hereby demands judgment against the said plaintiff in this action.

48 3. For a further counter-claim in this behalf, said defendant states that, after the execution and delivery to him of the aforesaid deed of said premises and before any default had occurred in respect to the payment of the moneys mentioned in the bond or writing obligatory set forth in said complaint, the said defendant erected and caused to be put on said premises valuable improvements, consisting of dwelling-houses, a saw-mill, a grist-mill, a dock, and other erections and fixtures, at an expense of over one hundred and fifty thousand dollars,

the possession, enjoyment, and benefit of which belonged to the defendant.

Second. And for a separate and further defence to the supposed cause of action alleged in said complaint, said defendant denies that the terms of the contract mentioned in said bond are correctly set forth in the said complaint; and on the contrary thereof avers that the whole of the said contract and the terms thereof are herein-above copied and set forth, and the defendant here refers to the same, as if the same were in this seperate defence repeated.

Said defendant also avers that the said bond or writing obligatory was executed in part fulfillment of said contract, and it was at the same time understood and agreed by and between the said plaintiff and
49 defendant that the said contract should continue in full force and effect, and that the plaintiff should keep and perform the covernants and provisions thereof on his part and behalf to be kept and performed, that said plaintiff has not kept and performed the provisions and covernant herein above particularly recited in respect to allowing defendant to sell such portions of the land as he might see fit, from time to time, but has failed and refused to keep or perform the said provision or covenant in the manner in this answer herein before particularly stated, and to which defendant refers as a part of this defence. Wherefore the plaintiff is not entitled to claim or demand the payment of the moneys mentioned in said bond. And the defendant denies that there is due or unpaid on account of said bond or the debt mentioned therein the sum or interest alleged and demanded in said complaint, or any sum whatever.

Whereupon the said defendant demands judgment against said plaintiff for the sum of one hundred thousand dollars, with costs and disbursements of this action.

(S'd) E. L. FANCHER,
Att'y for Defendant.

50 CITY AND COUNTY OF NEW YORK, *ss*:

James Bigler, the defendant above-named, being duly sworn, says that the foregoing answer is true to his knowledge, except as to the matters therein stated on his information and belief, and as to those matters he believes it to be true.

(S'd) J. BIGLER.

Sworn this 6th day of January, 1866, before me.

E. FRANCIS HYDE,
Notary Public in and for the City and County of New York.

(Indorsed:) N. Y. supreme court. William Waller vs. James Bigler. Reply. A. S. Sullivan, p'lt'ff's att'y. Exhibit "E." Filed June 16, A. D. 1866. W'm H. Barry, clerk, p'r J. P. Hodges, dep.

52 EXHIBIT "F."

Valuable land for sale.

By virtue of a deed of trust executed by James Bigler & his wife, both of N. York, to me, & dated 22nd June, 1853, I shall, on the 10th July next sell that valuable estate called Bigler's, situate in York County, Va., and containing 2,500 acres. The land lies immediately on York River, & 4 miles from Williamsburg.

The title is indisputable, but I shall sell as trustee. Terms cash. Sale on the premises.

RO. SAUNDERS, *Trustee.*

WILLIAMSBURG, VA., *June* 10, 1866.

53 (Indorsed:) Exhibit "F." Filed June 16, 1866. W'm H. Barry, clerk, p'r J. P. Hodges, dep't.

54 *Decree nisi.*

And at another day, to wit, at the rules held in the clerk's office of said court, on the first Monday in August, A. D. 1866, the subpœna in chancery issued under the aforegoing bill, having been returned executed upon the defendants, and they failing to answer, it is ordered that, unless they shall answer said bill according to law, the same will be taken for confessed, and the court will decree accordingly.

Pro confesso.

And at another day, to wit, at rules held in the clerk's office of said court, on the first Monday in September, A. D. 1866, the defendants still failing to answer, on motion of the plaintiffs, by counsel, the bill is taken for confessed, and the cause set down for hearing at the then next term.

55 At which day, to wit, at a circuit court of the United States for the district of Virginia, held on the 30th day of November, A. D. 1866, came the defendant William Waller, and by leave of the court filed his answer to the plaintiff's bill. Which said answer is in the words and figures following, to wit:

56 *Answer of def't W'm Waller.*

The answer of William Waller to the bill of complaint exhibited against him and Robert Saunders, in the circuit court of the United States for the district of Virginia, by James Bigler. For answer thereunto, or unto so much thereof as he is advised is material for him to answer, this respondent, objecting to the same for the many errors and deficiencies thereof, and denying all fraud and conspiracy, &c., &c., answers and says that it is true that, on the 2nd day of April, 1853, the complainant, then and now a citizen of New York, entered into an agreement with this respondent, then and now a citizen of Virginia, for the purchase of a tract of land in York County, (State of Va.,) of which the paper exhibited with the bill is a copy. But your respondent, further answering, says that, afterwards, to wit, on day of June, 1853, this contract was modified, and another one duly executed by the complainant, and this respondent substituted in its stead. That the same was executed in conformity with the provisions of the deed of trust, and recorded in the clerk's office of York County, but unfortunately cannot now be found, and the defendant believes was destroyed, together with many other records of the said county, during the late war, by the occupation of said county by the military forces of the United States. That some of the differences between it and the contract of June, 1853, appear from the deed of trust, of which Exhibit A, filed with the bill, is a true copy. That a material difference, which does not appear from the trust deed, consisted in the stipula-

57 tions; that the privelege of selling off parts of the land was not

to go to the extent of operating a serious reduction of the security afforded by the trust deed.

Your respondent admits that the Exhibits B & C are copies—the one of a deed made by this respondent to the complainant, and the other of the obligations for the purchase-money given by the complainant to this defendant.

In reply to the charge that this respondent had failed to comply with the contract, in refusing to allow the plaintiff to sell portions of the land, he says that it is wholly false, and that the records of York County court will show that the defendant did release to the complainant one hundred and fifty acres, which, or parcels of which, he sold for a much greater sum than he paid in to the said defendant. And as to the charge that the defendant authorized the trustee, Robert Saunders, to sell the land, and that he effected it without publishing the notice, as required by the said deed, and paid off the said bond, but refused to account for the surplus, this respondent says that he did require the sale of the land, but he gave no directions how it should be advertised. This respondent bought the land, but never took possession of it, and the charge that he did take possession of horses, mules, & farming implements, and sold lumber and fruit from the land, and rented it to the confederate government, is wholly false. Said trustee did not
58 sell a horse, mule, or any implement of husbandry, and did on no occasions pay to said defendant one cent in reduction of the debt due by said complainant. The defendant further avers that the sale was made under the deed of trust. That at the time of sale, and for many months previous, the plaintiff had abandoned the estate, leaving no agent or representative. That it had been taken possession of by the military authorities of the Confederate States, and that this respondent learning, and from watching seeing, that it was going rapidly to decay, and fearing that it would not bring at public sale the amount due by the plaintiff if not then sold, did authorize said Saunders to sell. The confederate authorities contended that the estate having been abandoned by its owner, it belonged to the then government, and enjoined the sale. The case was argued before Judge James Halleyburton, who decided that the deed of trust to the defendant constituted a prior lien to any which could accrue from a state of war, and the injunction was dissolved. By this decision, and the subsequent sale, the estate was greatly protected. The defendant avers that he did at the time of sale, and repeatedly afterwards, declare his intentions to offer the estate to said plaintiff at the close of the war, his object in purchasing it being solely to secure it from depredations; and that in furtherance of this object the said defendant did in May, 1865, offer to convey the land to the plaintiff, if he (the plaintiff) would pay
59 the bond then due.

The defendant further avers that the plaintiff acknowleged the debt as just, and promised to pay; that, in consequence of said promise, he suffered the plaintiff to leave Virginia without suing him, and that he expected to secure from the plaintiff the money due, in the course of a few months. The defendant went to New York in November, 1865, hoping and expecting to secure the sum due from the plaintiff, but was disappointed, the plaintiff refusing to pay.

The defendant further says that he was induced to bring suit in the State of New York, because of the refusal of the plaintiff to pay the debt, which he had promised to pay.

The defendant further says the charges made by the plaintiff that the defendant enjoyed possession of the estate from 1861 to 1865, and dur-

ing that time induced the commander of the confederate forces to destroy property on said estate, in order that he, the defendant, might secure large sums of money as damages, which he did receive, are each and all entirely false. The sale took place in April, 1862, and not as the plaintiff alleges, in 1861. During the year 1861, the defendant was not on the estate at all, and in one month from the sale, the estate was in the possession of the United States Army, then commanded by Gen'l McClellan, and continued so to be until the close of the war. The respondent alleges that this fact must have been known to the
60 plaintiff when he made the charge, because the estate is situated on the peninsular, about four miles from Williamsburg, and it is a matter of history familia' to all, that, aftert he battle of Williamsburg, in May, 1862, the Confederate States army was withdrawn, and the peninsular was occupied by the Army of the U. States until the close of the war in 1865.

The respondent further alleges that he has never, since selling the land to the plaintiff, in 1853, claimed possession. That the whole and only object and effect of the sale, in 1862, was to divest the confederate authorities of possession; and the defendant further says that the charge that the defendant succeeded in getting the commander of the confederate army to destroy the wharf, mills, and other buildings on said estate, to enable him to receive large compensation therefor, from the Confederate States, and that he did receive $25,000, is false. He has never, in fact, received one cent for such damages.

The respondent further avers that he has repeatedly offered to submit this whole matter to disinterested persons and by their decision abide. That he wrote to the plaintiff and suggested the Hon. James Speed, late Attorney Gen'l of the United States, as a suitable referee, but the plaintiff has persistently refused to agree to this proposition. The defendant has no personal acquaintance with the late Attorney Gen'l, but believing him to be a man of sense and honesty was
61 entirely willing to commit it to him.

The defendant further says that he does not believe the plaintiff expended on the estate $150,000, in improvements. That some years after the sale to plaintiff in 1853, when the buildings were new, and the mill in successful operation, and before the estate was pillaged of its timber (as is now the case) by the agents of the plaintiff, it was publicly advertised and sold by Mr. Ramsdale, of New York, and the largest bid offered was $25,000.

The defendant admits that he did negotiate with Messrs. Grubbs and Jones for a sale of his interest in the estate, that is to say, he offered to sell with special warranty, refusing positively to warrant generally. The effect of such sale if made would have been simply to put Grubbs and Jones in the shoes of said defendant, by which no conceivable injury could be done to said plaintiff.

The defendant further says that the plaintiff, on the 10th day of May, 1860, made the last payment he has made on account of said land, reducing his debt by one thousand dollars of principal and eight hundred and forty dollars of interest; that is, from fourteen thousand dollars to thirteen thousand dollars; which sum of thirteen thousand dollars, with interest from May 10th, 1860, to this date, due and payable in gold, the plaintiff now owes.

The defendant further says he did purchase the said estate in April, 1862, for the sum of $17,000. But the purchase, like other trans-
62 actions, was made with reference to confederate money as the medium of payment.

The respondent further answering says that if, as is alleged by the plaintiff, he did get an order from the military authorities putting him in possession, it was wholly unnecessary, as the respondent was not in possession, and at that time, before, and subsequently, offered to give the plaintiff an absolute deed.

This respondent further answering says that he does not believe the statement in the bill, with respect to the interview of the complainant's attorney, J. K. Heywood, with the said trustee, Robert Saunders. He is informed by said Saunders, that he indvertently advertised the said estate, without publishing notice according to the deed of trust, but he is informed by said trustee that when his attention was called to the fact by said Heywood, he at once communicated to said Heywood that he would desist from further proceedings under that notice, and accordingly he appointed another day for the sale, allowing of sixty days notice, which he gave by posting the same on the court-house door of York County, and by making publication for sixty days in one New York and two Richmond papers.

The respondent knows nothing of the paper filed, marked E. It is entirely false that this respondent made effort to have the said estate sold without notice according to the deed.

63 The respondent further alleges that, unless he is cheated and deceived by others, as he has been by this complainant, the charge of insolvency against him is entirely false.

In answer to the 6th special interrogatory, the respondent says he did offer to sell to Messrs. Grubbs & Jones as heretofore explained. In answer to 7th interrogatory, he says, he does not know any other matter or thing which may be of benefit to the plaintiff.

And having this answered he prays to be dismissed with his costs & that the injunction may be dissolved.

W'M WALLER.

Sworn & subscribed to before me this 30th day of November, A. D. 1866.

W. H. BARRY, *Clerk.*

(Indorsed:) Rec'd November 30, 1866. W. H. Barry, clerk.

64 And at another day, to wit, at the same court, continued and held on the 14th day of December, 1866, came the defendant Robert Saunders, and, by leave of the court, filed his answer to the plaintiffs' bill; which said answer is in the words and figures following, to wit:

65 *Answer of def't Robert Saunders.*

The answer of Robert Saunders to the bill of complaint exhibited against him and William Waller, in the circuit court of the United States for the district of Virginia, by James Bigler.

For answer, this deponent, saving and excepting, &c., and denying all fraud and conspiracy, says: That he has never had the slightest pecuniary interest in the contract set forth in the bill of injunction between the said Waller and the said Bigler, or in the sale made by Waller to Bigler, or in any payment made by Bigler to Waller. His only connection with the matter is as trustee in the deed of trust from Bigler to Waller, to secure the purchase-money. The first function which he performed in that capacity was to execute one or two deeds

of release to Bigler; he does not recollect whether one or two deeds, but he released, by the authority and direction of Waller, about one hundred and fifty acres of the land to Bigler. In reply to the numbered interrogatories, he says, that—

1st. According to the instruction and requirement of Waller, he did, on the 1st day of April, 1862, sell the real estate mentioned in the bill, by public auction on the premises, that is to say, he sold all of said estate except what had been, as above said, previously released to Bigler,
66 and except one or two other parcels of the land which had been contracted to be sold by Bigler to certain parties. The latter exceptions was by express direction of Waller, who declared that he did not wish to interfere with the contracts existing between Bigler and the purchasers, if the remainder of the land should suffice to pay the debt. The quantity of land embraced in this exception was, as well as this respondent recollects, about two hundred acres. The land sold was knocked down to Waller, he being the highest bidder, for the sum of $17,000.

2nd. In reply to the second interrogatory, this respondent says that he made a deed of conveyance, as trustee, to Waller for the land sold, took his receipt for $15,834 58⅓ cents and his note (which he now holds) for $1,165 41⅔ cents, that being the remainder of the $17,000, after paying debt and costs of executing trust.

3rd. In answer to the third interogatory, this respondent says that he advertised the sale according to the deed of trust, except that he did not advertise in a New York paper; the reason of which was, that there was then existing a prohibition by the Government of the United States of all communication to the Northern States by mail, and by all usual conveyances.

4th. In answer to the fourth interrogatory, this respondent says that the purchaser, Waller, did not take possession of the land under the sale; that he had never had possession thereof down to this time; that, within a few weeks after the sale mentioned, the whole region in which the land lies was taken possession of by troops of the Federal Government, (at war with Virginia, in one of the counties of which State the land aforesaid is situate,) which possession was maintained until
67 the end of the war, and that Bigler, either by tenants or by assignees, is in possession of the land now.

5th. In answer to the fifth interrogatory, this respondent says that he did, early in June, 1866, (as well as he recollects the date,) by direction of Waller, advertise a sale of the land, to be made at the door of the court-house of York County, in Virginia, (in which county the land lies,) without advertising the sale in newspapers in Richmond and New York, which omission was one of mere inadvertence. This respondent had a copy of the deed of trust, which copy was not an office copy, and the copier had omitted to note the clause requiring sixty days' notice of sale in papers of Richmond and New York, which clause this respondent had forgotten; this clause was a note at the end of the deed, which note was written after the signing of the deed by Bigler, and wife, and below the signatures, but acknowledged by Waller and by this respondent as part of the deed. That, soon after the advertisement just mentioned, this respondent had a visit from Haywood, who represented himself to be attorney for Bigler. That the said Haywood did, as alleged in the bill aforesaid, call the attention of this respondent to the fact that he had not advertised according to the terms of the deed of trust, of which he showed this respondent a certified copy from the clerk of York County, Virginia, aforesaid. But so far from this respondent saying

68 to the said Haywood, as is asserted in the bill aforesaid, that he, the respondent, intended to sell under the advertisement last mentioned and that he would not advertise according to the terms of the deed of trust, this respondent said to the said Haywood precisely the reverse, and, in accordance with declaration to the said Haywood, this respondent did at once advertise a sale of the said land at sixty days from date of advertisement, posting the advertisement at the door of the court-house of York County aforesaid (the original of which advertisement is herewith filed) and did send a similar notice at once to the Richmond "Whig" and to the New York "News" for insertion, as appears from extracts from those papers herewith filed, which extracts are copies of the advertisement sent respectively to those papers.

6th & 7th. This respondent further answering says that he knows nothing as to the sixth and seventh interrogatories; and having thus answered he prays to be hence dismissed with his costs.

24th Nov., 1866.

ROBERT SAUNDERS.

69 JAMES CITY COUNTY AND CITY OF WILLIAMSBURG,
State of Virginia, to wit:

This day personally appeared before me, Joseph Christian, judge of the sixth judicial circuit of Virginia, Robert Saunders, whose name is signed to the answer above, and made oath that the statements of facts made therein are true, so far as they rest within his knowledge, and so far as they rest upon information derived from others, that he believes them to be true.

Given under my hand this 26th day of November, 1866.

JOS. CHRISTIAN.

70 (Indorsed:) Bigler vs. Waller and Saunders. Answer of Bob't Saunders. Filed December 14, 1866. W. H. Barry, cl'k, p. J. P. Hodges, dep.

71 *Notice of sale.*

Valuable land for sale.

By virtue of a deed of trust executed by James Bigler & his wife, both of New York, to me, dated 22nd June, 1853, I shall, on the 20th August next, sell that valuable estate called "Bigler's," situate in York County, Virginia, and containing 2,500 acres.

The land lies immediately on York River and four miles from Williamsburg. The title is indisputable, but I shall sell as trustee. Terms, cash. Sale on the premises.

RO. SAUNDERS,
Trustee.

WILLIAMSBURG, 19*th June*, 1866.

72 (Indorsed:) Original notice. Filed Dec'r 14, 1866. W. H. Barry, clerk, by J. P. Hodges, dep.

73 *Notices of sale.*

[Richmond Whig, Saturday morning, July 7, 1866]

Auction sales. Valuable land for sale.

By virtue of a deed of trust executed to me by James Bigler and his

wife, of the State of New York, dated 22d January, 1853, I shall, on the 20th day of August next, sell at public auction that valuable estate called "Bigler's," situate in York County, Va., and containing about 2,500 acres. The land lies on York River, about four miles from Williamsburg.

The title is indisputable, but I shall sell as trustee. Sale on premises. Terms, cash.

ROBERT SAUNDERS,
Trustee.

[New York Weekly News, New York, Saturday June 30, 1866.]

Valuable land for sale.

By virtue of a deed of trust executed to me by James Bigler and his wife, of the State of New York, dated 22 January, 1853, I shall, on the 20th of August next, sell at public auction that valuable estate called "Bigler's," situate in York County, Va., and containing about 2,500 acres. The land lies on York River, about four miles from Williamsburg.

The title is indisputable, but I shall sell as trustee. Sale on premises. Terms cash.

ROBERT SAUNDERS,
Trustee.

(Indorsed:) Notice of sale.

74 *Notice to dissolve in'j'n.*

Mr. James Bigler and Mr. J. H. Sands, his counsel:

SIRS: Take notice that, on the twentieth day of December, 1866, at the city of Norfolk, Virginia, I shall move the Hon J. C. Underwood, judge, &c., &c., &c., &c., to dissolve the injunction granted by the said the Hon. J. C. Underwood to the said James Bigler upon his, the said James Bigler's, bill against me and Robert Saunders, esq'r, subscribed and sworn to on the 14th day of June, 1866, before him, the Hon. J. C. Underwood, by one J. K. Heyward, attorney, &c.

W'M WALLER.

RICHMOND, *Dec. 11th* 1866.

75 STATE OF VIRGINIA,
City of Richmond:

This day personally appeared before me, a notary public for the said city of Richmond, within the said corporation, James Alfred Jones, who made oath that he delivered to J. H. Sands, esq., counsel of James Bigler, on the eleventh day of December, 1866, a true copy of the within notice.

Given under my hand this eleventh day of December, 1866.

J. B. MACMURDO,
Notary Public.

(Indorsed:) Notice to dissolve inj. Filed Dec. 14, 1866. W. H. Barry, clerk, pr. J. P. Hodges, dep.

76 And at another day, to wit:

At a circuit court of the United States of America for the

district of Virginia, held at the city of Richmond, Va., on the 15th day of May, A. D. 1867—

Present, the Hon. J. C. Underwood, presiding.

JAMES BIGLER, COMPLAINANT,
against
WILLIAM WALLER & ROBERT SAUNDERS, def't's.

This day this cause came on to be heard on the bills & exhibits therewith filed; on the answers of the defendants, W'm Waller and Robert Saunders, which have been filed by leave of court; general replications thereto, and the exhibits filed with the said answers; on the examination of William Waller as a witness, and the arguments of counsel. On consideration whereof the court doth adjudge, order, and decree that George Chahoon, a commissioner of this court take an account of the balance due by the plaintiff to the defendant Waller, on account of the purchase-money of the tract of land, in the proceedings mentioned, and also an account of the offsets in the nature of rent, waste, and damages claimed by the plaintiff to be due him by the defendant, and report the same, together with any matter deemed pertinent
77 by himself, or required by either party to be so stated.

A copy. Teste:

[SEAL.] W'M H. BARRY, *Clerk.*

(Indorsed:) Bigler v. Waller et al. Decree.

And thereupon, on the 2d day of November, 1867, the said commissioner, Geo. Chahoon, filed his report as directed by the aforesaid decree, which said report with the exceptions of defendants thereto, and exhibits accompanying, are in the words and figures following, to wit:

78 *Commissioner's notice.*

At a circuit court of the United States of America for the district of Virginia, held at the city of Richmond, Va., on the 15th day of May, A. D. 1857—

Present, the Hon. J. C. Underwood, presiding.

JAMES BIGLER, COMPLAINANT,
against
WILLIAM WALLER & ROBERT SAUNDERS, def't's.

This day this cause came on to be heard on the bill and exhibits herewith filed; on the answers of the defendants, W'm Waller and Robert Saunders, which have been filed by leave of court; general replications thereto, and the exhibits filed with the said answers; on the examination of W'm Waller as a witness, and the arguments of counsel. On consideration whereof, the court doth adjudge, order, and decree that George Chahoon, a commissioner of this court, take an account of the balance due by the plaintiff to the defendant Waller, on account of the purchase-money of the tract of land in the proceedings mentioned, and also an account of the offsets in the nature of rent, waste, and damages claimed by the plaintiff to be due him by the defendant, and report the

same together with any matter deemed pertinent by himself or required by either party to be so stated.

A copy. Teste:

W. H. BARRY, *Clerk.*

79 To James Bigler, William Waller, and Robert Saunders:

U. S. COMMISSIONER'S OFFICE,
Richmond, Va., Aug. 29th, 1867.

The parties interested in the decree of which the foregoing is a copy, are hereby notified that I have fixed on the 5th day of September, 1867, as the time, and my office in the city of Richmond, as the place for executing the duties therein required of me, at which time and place they are required to attend with the necessary evidence to enable me to do so.

Given under my hand the day and year first aforesaid.

GEORGE CHAHOON,
U. S. Commissioner.

I acknowledge service for W'm Waller & R. Saunders, 29 August, 1867.

JOHN DUNLOP.

Executed Aug. 30, [1867,] by delivering a true copy of the within to Johnson H. Sands, esq'r., in person, (counsel for the plaintiff.)

JNO. UNDERWOOD.
U. S. Marshal.
By J. A. LYNHAM, *Deputy.*

80 (Indorsed:) Commissioner's notice to receive evidence to enable him to make up his account.

81 *Commissioner's report.*

BIGLER
vs.
WALLER ET AL.

RICHMOND, VA., *Dec. 20th,* 1867.

It was agreed between the counsel of the parties interested that as soon as evidence was produced before the commissioner, showing that an appeal had been taken by def't Waller in the suit in New York, of Waller vs. Bigler, that evidence of such appeal should be filed as part of the evidence in this case; which is herewith done, and marked and exhibit.

GEO. CHAHOON,
Commissioner.

In the circuit court of the United States for the district of Va.

BIGLER
vs.
WALLER ET AL.

COMMISSIONER'S OFFICE,
Richmond, Va., Nov. 2nd, 1867.

Pursuant to the decree entered in this cause on the 15th day of May,

1867, I notified the parties interested to attend at my office, in the city of Richmond, State of Virginia, on the 5th day of Sept., 1867, with the necessary evidence to enable me to make up the account required by said decree; at which time and place the defendant, William Waller, appeared in person, and James Dunlop, esq., also appeared as counsel for the defendant, and James Bigler was represented by J. H. Sands, esq., his counsel; and, at the request of the defendants counsel, I took the evidence on the sixth and seventh days of September, 1867, which is herewith returned; and by the consent of the parties, by their attorneys, the proceedings were adjourned, and continued on the 29th day of October, 1867, at the same place; at which last-named time and place James Dunlop, esq., appeared as counsel for the defendants, and J. K. Hayward and J. H. Sands, esq'r's, appeared as counsel for the plaintiff; and, by consent of said parties, by their attorneys,
83 I took and filed evidence herewith returned, subject to objections therein noted by defendant's counsel. The depositions of the witnesses, and all of the evidence submitted by both plaintiff and defendants is herewith returned, together with notice under which I acted. All exceptions taken by either party are noted in the papers.

Upon the evidence and pleadings in the cause, I have to report the annexed account, marked "A," "B," and statement "C."

"A" is an account between James Bigler, plaintiff, and William Waller, defendant, showing, on the 10th day of May, 1860, a balance of $13,000, with interest from that date until paid, due by the former to the latter.

"B" is an account between W'm Waller, defendant, and James Bigler, plaintiff, showing, on the 3rd day of April, 1865, a balance of $43,000 due by the defendant to the plaintiff on account of offsets in the nature of rent, waste, and damages.

"C" is a special statement, showing, on the 3rd day of April, 1865, a balance of $26,186, with interest from date until paid, due by William Waller, defendant, to James Bigler, plaintiff, upon balancing ac-
84 counts "A" and "B."

I respectfully recommend that the injunction now existing in this case be made perpetual, and that the bond against Bigler, referred to in this suit, be delivered up and cancelled, and that the defendants, Waller and Saunders, be ordered to execute a release deed to the plaintiff.

Respectfully submitted:

GEO. CHAHOON,
Commissioner.

85–86 "A." "A."

DR. *James Bigler in account with William Waller.* CR.

1860.		1860.	
May 10. To balance due by James Bigler to W'm Waller, per contra...	$13,000 00	May 10. By balance due on the bond by James Bigler to W'm Waller, on account of the purchase-money of the tract land in the proceedings mentioned ..	$13,000 00
	$13,000 00		$13,000 00
		1860.	
		May 10. By balance due by James Bigler to William Waller ..... with interest on the above balance from May 10th, 1860, until paid.	$13,000 00

87–88 "B." "B."

DR. *William Waller in account with James Bigler.* CR.

1865. April 3. By balance due by William Waller to James Bigler, per contra.	$43,000 00	1865. April 3. By amount due by William Waller to James Bigler, for rent of the land in the proceedings mentioned, from the date of his purchase, in April, 1862, to date	$15,000 00
		" " Am't due by same to same, for waste committed by the latter on said land	$25,000 00
		" " Am't due by same to same, for damages sustained by said Bigler at the hands of said Waller, for breach of contract, &c	$3,000 00
	$43,000 00		$43,000 00
		1865. April 3. By balance due by William Waller to James Bigler with interest on the same from April 3rd, 1865, until paid.	$43,000 00

89–90 *Statement "C," showing the difference between accounts "A" and "B."*

1860. May 10. To balance of principal due by James Bigler to William Waller, as appears per account "A"	$13,000 00	1865. April 3. By balance due by William Waller to James Bigler, as appears per account "B"	43,000 00
1865. April 3. Interest on same from May 10th, 1868, to date	3,814 00		
" " To balance due by W'm Waller to James Bigler, per contra	26,186 00		
	43,000 00		43,000 00
		1865. April 3. By balance due by William Waller to James Bigler with interest on same until paid.	26,186 00

91 The defendant W'm Waller, excepts to the within report of Commissioner Chahoon, as follows, viz: First, to statement B, made part of the report, because there is no evidence to show that he, W'm Waller, owes anything for rent of the land in the proceedings mentioned, or committed any waste of it, or broke any contract in respect to it, but evidence to the contrary thereof; second, to statement C, based on said statement B, and erroneous for the same reasons; and he excepts to the report because it rests on the basis of these erroneous amounts. And he excepts to so much of the report as volunteers the advise to the court how to proceed in the future conduct of the case.

W'M WALLER,
By his counsel JAMES ALFRED JONES.

NOV. 2ND, 1867.

(Indorsed:) Bigler vs. Waller. Commissioner's report. Rec'd in office & filed 1867, Nov. 2nd. W. H. Barry, cl'k.

1867, Dec. 2nd. Exceptions filed to commissioner's report. Filed Nov. 2, 1867.

92 *Deposition of J. K. Hayward.*

JAMES BIGLER
vs.
WILLIAM WALLER.

Deposition of J. K. Haywood taken before Geo. Chahoon this 30th day of Oct., 1867.

Present, John Dunlop for def't, and J. H. Sands for plaintiff.

J. K. HAYWOOD sworn.

93 Question by J. H. Sands. Please state whether you were counsel in a case decided in the supreme court of New York, between W'm Waller, plaintiff, and James Bigler, defendant, and whether or not the same issues were involved in that suit as in this case now pending in the cir. c't of the U. S. for the dist. of Va., in which James Bigler is pl'ff, and W'm Waller is def't?

(Objected to by Mr. Dunlop on the ground that the answer of Mr. Hayward to the second part of the question would be secondary evidence, and that the record of the court is primary evidence.)

(Taken subject to the above-exceptions.)

A. I was counsel in said action. On or about Nov. 11th, 1865, W'm Waller, def't in this suit, brought action in the supreme court of the State of New York by his att'y, A. S. Sulivan, counseller of said court, on a certain bond, marked Waller's Exhibit "C," in this suit, in which he claimed that $13,000 was due the said Waller from James Bigler, with interest at six per centum from the 10th day of May, 1860. The def't Bigler answered said plaintiff's complaint claiming due as a

94 'coupment and set-off, damages against said Waller for a breach of said Waller's covenants in his agreement to convey an estate in York County, Virginia, the covenants of which agreement were a part of said bond; also damages for the rent of said estate claimed to be in possession of said Waller from April 1st, 1860 to Jan'y, 1865; also for damages for waste committed upon said estate while it was in said occupancy of Waller; also for personal property destroyed upon said estate during said occupation of said Waller; deff's replied to said recoupment and set-off, denying the same, by his counsel, E. L. Fancher, and J. K. Haywood, esqrs, counsellers of said court in said State. Said action was referred by said court, on the appearance of said counsel before said court, and the written consent of said counsel, to Luther R. March, esq., counseller of said court, as referee to hear and decide the whole issue. Said Waller appeared before said referee and introduced evidence in reference to the issues in said case and himself testified in regard to the same.

Said Bigler appeared before said referee and introduced the depositions of himself and the depositions of Knapp, Deane, Southard and Smith,

95 substantially, according to the exhibits, marked "11," "10," "9," "8," "7," "6," "5," & "3." Said evidence was taken by a phonographic reporter before said referee. After the introduction of said testimony in said suit of Waller vs. Bigler, the case was summed up by the respective counsel aforesaid, before the said referee in the presence of the said Waller and Bigler, and said referee reported to said court his findings of law and fact in said suit as per report contained in the exhibit herewith offered and marked "Bigler's Exhibit No. 12." That said claims in favor of the said defendant Bigler against the plaintiff

Waller, amount together to more than the claim of the plaintiff, and he is not entitled to recover anything in this action; that on the merits, judgement should be rendered in this action in favor of the def't Bigler, against the plaintiff Waller, dismissing the complaint with costs. That on the 17th day of Oct., 1867, said judgement in favor of said plaintiff Bigler was entered against said def't Waller for the sum of $1,004 77 costs in said action, and that said plaintiff's complaint be dismissed, which judgement is now existing in said supreme court as a good
96 and valid judgement upon the issues involved in said action substantially according to the exhibit marked "Bigler's Exhibit No. 12," in this suit; that said supreme court has full equity and common-law jurisdiction in said State.

No cross-examination. Exceptions renewed by Jno. Dunlop.

J. K. HAYWOOD.

97 (Indorsed:) Deposition of J. K. Haywood. 1867, Nov. 2, rec'd in office & filed. W. H. Barry, cl'k. Filed. Geo. Chahoon, commissioner.

98 *Deposition of Ja's W. Custiss.*

The deposition of James W. Custiss and others, taken before me, Geo. Chahoon, a commissioner of the U. S. circuit court for the dist. of Virginia, at my office in the city of Richmond, on the 6th day of Sept., 1867, between the hours of 6 a. m. & 6 p. m., to be read as evidence on behalf of W'm Waller in the case of Bigler v. Waller, depending in the circuit court of the U. S. for the dist. of Va., wherein James Bigler is plaintiff & W'm Waller & Robert Saunders are def'ts.

Present, J. H. Sands for pl'i'ff, and John Dunlop, counsel for def'ts.

1st question by John Dunlop, att'y for def't. Where did you reside before the war?

Answer. In Williamsburg.

2nd question by same. Did you reside in W'msburg during the war; and if not, when did you leave it?

Answer. I left there on 1st of Dec., 1861, but visited W'msburg up to Ap'l, 1862.

3rd question by same. Are you acquainted with pl't'ff & def'ts?

Answer. I am.

Q. by same. The pl't'ff has said that, during the late war, *that* the def't Waller did, with others, go on his (Bigler's) estate, on York River, and there forcibly expelled his (Bigler's) tenants. State whether
99 you know whether any expulsion by force was ever made, and whether or not Bigler's tenants left that estate voluntarily?

A. I know that a party of gentlemen associated in what was termed a police company in W'msburg and its neighborhood, and in Ap'l, 1861, visited Bigler's farm, and Mr. Waller was not of the party, nor did I see Mr. Waller anywhere in that neighborhood during any part of the early part of that year. I was one of the party named. The State of Va. had just seceded about the time of this visit, and there were no military there at that time. I did not see Mr. Waller there during the 1st ½ of the year 1861. This party attempted no force to drive away any person from Bigler's estate; to the contrary, all that was said by any person, save myself, was advising them not to go away, but to stay; that they would not be interfered with either by the citizens, military, or civil authorities, but would be protected as citizens of Va. I advised

them publicly, in the form of an address, that all of them who were desirous of returning to their homes and families and friends, during a long contest between two portions of the country, in a war of
100 great bitterness and feeling, to then go while they had an opportunity of doing so. There was a vessel at the wharf which could and should take the whole of them, with their property, and it would be to their interest to go. If they remained, they would be subject to military duty, and might be compelled to do what was disagreeable to them, to take up arms against their own friends at home. If they had any necessity for money to support them in their passage, I would furnish it for them; and I did write a letter advising all persons who they might fall in the way of, who might molest them, to let them pass as peaceable citizens to their homes, where they were bound. After leaving that wharf, several of them came to me while I was sitting on my horse, and thanked me for the kind advice I gave them, and said that they would accept it. They did leave, and Mr. Bigler sent me this letter, which I hand you, marked "A."

Q. Did you give this advice with the request of Mr. Waller, or not?

A. I did not. I had not seen Mr. Waller at tha' time.

Q. Do you remember seeing Mr. Waller on the peninsula at any time during the year 1861?

A. I do not.

Q. Did you know Dr. M. P. Waller?

101 A. I did, sir.

Q. Did you know to whom the estate on which he lived belonged?

A. It belonged to Littleton Waller Tazewell, father of Dr. Waller's wife.

Q. Do you know whether Dr. Waller had any considerable property in his own right?

A. I do not think he had.

Q. Was he a man of means?

A. He had some negroes, sufficient to work the farm which he claimed as his, sent on the farm by his father.

Q. Is Dr. Waller alive?

A. He is dead; he died before Ap'l, 1862.

Q. Was Dr. Waller solvent or insolvent before his death?

A. Dr. Waller had credit with everybody, as far as I know, during his lifetime. Since his death it has been shown that he owed large debts before 1861.

Q. Do you or not know that Dr. Waller offered Bigler $18,000 for 600 acres of land?

A. I do not. I never heard anything said about it.

Q. From your knowledge of Dr. Waller's circumstances, do you believe that he could pay $18,000 for any estate?

A. I cannot answer that, as I have known insolvent men to
102 buy large quantities of land, and pay for it.

Q. From the relations which you know subsisting between Dr. Waller and the def't Waller, do you or not believe that, had Dr. Waller expressed a desire to purchase a part or the whole of Bigler's property, that said def't Waller would have gladly done everything in his power to further the wishes of said Dr. M. P. Waller?

A. They were very near relations, and very warm friends, and I should suppose he would have done so.

Q. After the estate was abandoned by Bigler's tenants, who took possession?

A. Only a portion of Bigler's tenants left. The houses made vacant in the mouths of July & Aug. were taken possession of by the confederate authorities, and used as hospitals. The lands never were interfered with by anybody.

Q. How long did the confederate forces hold possession of that property?

A. Until May, 1862.

Q. Was not this estate, from May, 1862, to the close of the war, in possession of the Federal Army?

A. I was not residing in that neighborhood during that time, and do not know who held it. It was not occupied by either army after May, 1862, being near the lines held by the Federal Army.

103 Q. Did you or not ever know or hear of the def't selling any timber or peaches from that farm after it was sold to Bigler in 1853?

A. I never heard or knew anything about it.

Q. What would you suppose an estate situated as this estate was from 1861 to 1865 was worth for rent, per annum, for any purpose?

A. I should not suppose it was worth anything, it being right on the lines, where it was raided on by both armies.

Q. Knowing, as you do, all the facts and circumstances relative to the abandonement of this estate by Bigler's tenants, do you or not believe that said Waller did by his course injure Mr. Bigler one cent by purchasing the estate?

A. I cannot see how it could injure him. The majority of Bigler's tenants remained all the time during the war on the place, and there were other tenants in houses purchased of Bigler by parties who bought of him, remaining with the tenants alluded to. Other parties nearer the *nearer the* lines than these houses vacated their own houses, and filled up the empty houses on Bigler's place, thereby taking care of the houses. The lands could not be cultivated, because the crops could not be protected.

Q. Do you or not remember of ever having heard the def't Waller, state that his object in purchasing the land was to save it from

104 desolation and thereby save his debt?

A. I do not.

Q. The plaintiff, Mr. Bigler, states that def't Waller induced Gen'l Johnson to burn the mill; do you or not know whether this mill was burnt by the order of Gen'l Johnson?

A. I do not.

Q. Do you not know that the mill was a part of the security of def't Waller's debt?

A. I only know that the mill was on the land.

Cross-examined. Questions by J. H. Sands:

Q. What caused you to leave W'msburg in 1861 or 1862; and did you ever return and reside there after that time, up to the end of the war?

A. The principal cause of my leaving was, that I was a member of the gen'l assembly of Va., and my property was taken by the confederate troops; and that portion of the peninsula where I lived was filled by the troops of both armies. My family, consist*ing* of wife & 4 daughters, two of them school girls, and I moved them with me to a part of the country where I could obtain the advantages of a school, and a quiet home for my family. I visited W'msburg from Nov. '61 to the evacuation by the confederate army of the peninsula in May, 1862, after which time I visited only once, while Gen'l Wise held the city of

105 W'msburg, until the close of the war.

Q. Did you or not leave W'msburg in consequence of the abandonment of the place by the confederate forces, in order to save your slave property, and to attend your seat in the gen'l assembly, and to be within the confederate lines?

A. A part of my answer is already given. I did not leave to protect my negro property. I left 12 or 15 negroes, with mules, cattle, sheep, hogs, corn, meat, and food sufficient to last them 2 years, with instructions to farm and take care of themselves the best way they could. If my family had been other than female I should have remained in W'msburg and not come away.

Q. Did you or not leave W'msburg solely upon the ground that you had female members in your *in your* family; and did or not any females remain in W'msburg after the evacuation of that place by the confederate forces, who had means to go away?

A. The first part of this question is already answered in the preceding answer. A considerable number of females of high character did remain a part of the time in W'msburg, and were sent away from W'msburg by the commander of the post, their houses shut up in part, and much of their property destroyed, before they were allowed
106 to return. This was when W'msburg was occupied by the Federal forces in the very latter part of the war, that proves that I was not wrong in taking my family away in time.

Q. Did you not bring away from the peninsula, at the time of the evacuation by the confederate forces, all of your negro property, which was large, except a few infirm ones, in order to secure them from capture by the Federal forces?

A. I brought away all of my negroes except those before mentioned; they were my property; had nothing to do with the estate in question, and I cannot see what motive counsel for Bigler can have in inquiring of me what motives, as an individual, I had in either moving myself or my negroes has to do in this matter; but as he seems desirous to know my motive and purpose in bringing away these slaves I will say to him that it was to use them as property in my own manner, and to my own interest. These slaves were clothed and fed and protected by me, and returned by me to their homes where they were brought from, since the war ended.

Q. Did you or not serve in the legislature, at Richmond, during the war, and sympathize with the rebellion?

A. I did all that mortal man could do, except take his gun and fight.

107 Q. In your answer to 2nd interrogatory-in-chief you state that a police company visited Bigler's mills in 1861; was or not the object of this visit to ascertain the political views of these tenants, composed of Northern men, and to warn such as did not agree with Virginia in seceding to leave there?

A. No such purpose, as I understood it. I think that their object in going there was more on account of the vessel that was loading at the wharf, to see that they carried no negroes away, and to advise these tenants of what they thought best for them to do under the circumstances in which they were placed. All, but myself, who addressed these people, advised them to remain as they were, and there was nothing but kind feeling felt towards them by every man who went there. I will further say that, in the month of July or August, 1861, I visited Richmond and got from the sec. of war of the confederate government permission to let 9 men from the State of N. J., who were laboring men on the peninsula—at that time, when there was an army

of thousands of confederates stationed where these 9 men were at the time, there was no attempt, on the part of that army, to put these men in the confederate service—and the sec. of war gave these 9 men
108 permission to go through the lines to Norfolk City, and directed the commander there to give them every convenience in his power to enable them to reach Old Point, and *each of* these men were furnished with sufficient money, gratuitously, to enable them to reach their homes in the North.

Q. What were the circumstances requiring the police to visit these people especially, and to pay their expenses north?

A. I have already answered that in 3 preceding answers, save the question about the expense. There was no expense charged nor needed by those people; the money was only offered if needed; they did not need it.

Q. Please state the names of each of said police force, as you remember, and whether or not they were the friends and relations of def't Waller, and inimical to Bigler?

A. I recollect Moses Harrold, Goodrich, Durfey, W'm S. Peachy, Cha's Hansford, Mr. Corsenham, Dr. Camm. Mr. Corsenham was the only connection, by marriage, to def't Waller; Dr. Camm was the physician of every family at the place. I believe that all of these men were friends of def't Wallers, and I can see no motive why they should have been inimical to Bigler, nor do I believe that the visit by
109 these people was owing to any prejudice towards Bigler or any person there.

Q. Did or not some feeling exist, at that time, prejudicial towards Northern men?

A. The very secession of the States, separating themselves from the North, shows that there did.

Q. Could or not Mr. Waller have visited said estate during the year 1861 or 1862, and made any expulsion of tenants, without your knowledge?

A. Certainly he could. I was in the habit of visiting Bigler's Mills, from the occupation of the place by the C. S. A., very often. I had there 3 or 4 female servants and acquaintances of myself and family; for 5 or 6 months of the year 1861 there was no expulsion or driving away of tenants during that time, and I am satisfied that all the tenants of Bigler's remaining after the others left continued in possession of the quarters during the whole war.

Q. Did or not def't Waller, in 1862, purchase this place, and thereby *accrue* control over it, and the tenants thereon acknowledge him as landlord?

A. I never was at Bigler's after Nov. 1861, until after the war ceased, and cannot say what position Waller and the tenants held towards each other after that time, but I would suppose that, under the cir-
110 cumstances, the tenants would respect Mr. Waller as owner of the property.

Q. How far was this estate from the Federal lines or confederate lines?

A. The Federal lines was a creek—separating Bigler's farm from the Federal Army. The distance from that creek to Bigler's lands was not more than a ½ mile; to the village, the creek was less than a mile and a half. The confederate army was not near Bigler's after the evacuation.

Reëxamined:

Q. State what your feelings towards Mr. Bigler were.

A. Nothing but kindly feelings towards him and his interests. I have known him for 14 years. We have always had the best relations, both in money matters and otherwise.

Q. State, as far as you know, whether def't Waller ever expelled or tried to expel any tenants put on that estate by Bigler?

A. Not that I know or ever heard of.

And further this deponent saith not.

JA'S W. CUSTISS.

The further taking of these depositions adjourned until Sept. 7th at 10 a. m.

GEO. CHAHOON,
Commissioner.

(Indorsed:) Deposition of James W. Custiss. Filed. Geo. Chahoon, commissioner.

111 *Depositions of Ro. Douthat, W. Goddin, T. R. Bowden, P. Haxall.*

SEPT. 7TH.—At request of Mr. Sands the further taking of depositions was adjourned until 4 p. m. to-day—

Present, John Dunlop for the def'ts.

ROBERT DOUTHAT sworn.

1st question, by John Dunlop:

Q. Were you on the peninsula during 1861 & 1862, up to the evacuation of the peninsula by Gen. Jo. E. Johnson?

A. I joined Gen'l Magruder about June 1st, 1861, and remained with him until May, 1862, when the peninsula was evacuated by Gen. Johnson.

Q. Do you or not know that def. Waller was a member of the army of the peninsula.

A. I think that I know all of the officers by sight in the army of the peninsula, and think if he had been in the army of the peninsula I would have known it, for our relations were intimate, and we would have found each other some way or other.

Q. Do you or not own an estate on the James River?

A. I do.

Q. What do you consider the sale of 28 acres of that land immediately in the centre of your estate and fronting the river, with a right of way through the entire estate, if sold, would have on the residue
112 of the land; in other words, what would you sell it for?

A. I would not sell twenty acres in the centre of my estate for less than a third of the half the value of my whole estate, for the reason that the sale of a lot in the center of my estate would materially injure the said estate.

Q. Please state, knowing as you do the condition of the country in James City, Charles City, and York, the rental value of real estate in those counties during the war.

A. I consider the rental value of land there, at that time as nothing. I let a man have my estate for that time for simply trying to take care of it for me. I got nothing from him.

Q. What was the average of the revenue from your estate previous to the war?

A. From $7,000 to $13,000 gross revenue. I never made less than $7,000 and have sold $13,000.

Q. What was the rental value of your estate during the war?

A. Nothing, sir.

And further this deponent saith not.

RO. DOUTHAT.

WELLINGTON GODDIN sworn.

Q. Where did you reside from 1861 to 1865?

A. In Richmond.

Q. What is your profession?

113 A. A real estate auctioneer.

Q. Are you acquainted with def't Waller?

A. Yes, sir.

Q. During the war did you offer for sale any real estate for Mr Waller?

A. I did; at the request of Mr. Waller, some time during the latter part of the year 1863. I sold his farm on York River, called Bigler's, to Mr. James B. Jones and Peter W. Grubbs, for, if I recollect, $60,000 in confederate treasury notes. After the sale was made and deed executed, it was found that it conveyed a special, instead of what the purchasers required, a general warrantee. After a good deal of correspondence and negotiation, the purchasers insisting that they should have a general warrantee, and W'm Waller declining to give any but a special warrantee, the sale was by mutual consent cancelled; thereupon the deed Waller had executed was returned to him.

Q. Did Mr. Waller give any reasons for refusing a general warrantee?

A. I can't remember distinctly at present whether Mr. Waller gave any reasons why he would not give a general warrantee.

Q. Do you or not recollect that def't Waller gave as his reasons

114 that he intended to convey no other than the title Saunders conveyed to him?

A. I remember that Waller gave this as a reason; it is proper that I should remark that at the time I sold the land I was under the impression that he would give the general warrantee deed, but afterwards learned that he would give no other title than the trustee, Saunders, gave to him.

Q. Knowing as you do, the condition of estates in the peninsula during the war, especially in the counties of James City, York, New Kent, do you or not believe that persons renting land there did so at great risks from depredations from both the northern & southern army?

A. From my general impression of the country alluded to I would say that it would have been almost impossible to have rented lands there for anything then—at that time.

Q. Would you have rented the best estate in the region mentioned at any price?

A. I should not, for the reason that I should have been afraid to have carried my slaves, horses, mules, or any other property, or my own person in that region at that time, as I well knew that the inhabitants were daily in great fear of having themselves imprisoned and their property taken from them, as often happened. Depredations

115 were committed by both armies.

And further this deponent saith not.

W. GODDIN.

THOMAS R. BOWDEN sworn.

Q. Where did you live during the early part of the war?

A. I was in W'msburg from Ap'l, 1861, until August, 1862, and off and on during the war. W'msburg was my home.

Q. Are you acquainted with def't Waller?

A. Yes, sir.

Q. Did you see him in W'msburg during the war?

A. I did not.

Q. Do you or not believe that if def't Waller had been there you would have seen him?

A. I have no doubt that I should have seen him.

Q. From your knowledge of things on the peninsula during the war, do you believe that any man, alive to his own interest, would have rented land at any price, exposing, as he must necessarily have done, his property to the depredations of both armies?

A. I do not think I would have given anything of any consequence for the rent of any land at that time & place. All crops were subject to the depredations of both armies. Had a farm been given me—

116 land free of rent—I would not have cultivated it for what I might have made on it.

And further this deponent saith not.

THO'S R. BOWDEN.

PHILIP HAXALL sworn.

Q. Do you know def't Waller?

A. Yes.

Q. Did you know Waller during 1861?

A. I did. I knew him during the fall of 1861.

Q. Where?

A. I knew him in the confederate army of the Potomac, 4th Va. cavalry, of which both of us were members.

Q. How long did you know him there?

A. Until the 16th of Nov., 1861.

Q. After that period was def't Waller in South Carolina with you?

A. He was. He was there the greater part of the year 1864.

Q. Was def't Waller attached to the army in S. C. during the year 1864?

A. He was; on Gen'l Robinson's staff.

And further this deponent saith not.

PHILIP HAXALL.

R. McC. JONES sworn:

117 Q. What do you believe that the estates on the peninsula were worth to rent during the war?

A. I would not have rented a farm at all.

And further this deponent saith not.

R. McC. JONES.

Adjourned to be brought on by consent of parties.

GEO. CHAHOON,
U. S. Commissioner.

118 (Indorsed:) Bigler vs. Waller. Depositions for def't. Depositions of Goddin et al. Rec'd in office and filed Nov. 2, 1867. W. H. Barry, cl'k. Filed. Geo. Chahoon, commissioner.

119 *Letter from J. Bigler.*

NEWBURG, *May 12th*, 1860.

WILLIAM WALLER, Esq.:

D'R SIR: Your favor of the 3d inst. is received. In reply, I would say that I yesterday paid your draft of $1,840 due this day.

In reference to the other matter, as I said to you in my letter of April 2nd, it will very much depend upon my success in business this summer. I think I will be able to write you definitely in July. I would say that the prospects are very good now. You spoke of coming to West Point in June. Newburg is 8 miles above the Point, on the same side of the Hudson. I would be pleased to have you call on me, if you can do so, when I may be able to speak more definite.

Yours, &c., J. BIGLER.

(Indorsed:) Pl'ff's Ex. No. 2. July 23, '67. G. R. B. Waller's Exhibits.

120 *Letter from W'm Waller.*

LYNCHBURG, *Feb'y 12th*, 1866.

JAMES BIGLER, Esqu.:

D'R SIR: Your last letter was received a few days since, but severe indisposition has prevented a reply.

Altho' I do not believe, from all I can learn of the condition of things in Williamsburg and its vicinity, that land is selling at any price, still, to have a speedy settlement of our matters, I will consent to your offer of the land as contained in your letter of the 20th Dec'r last. In order to effect this, your presence in Williamsburg will be necessary, as the legal title to the land being in Mr. Saunders, (trustee,) it will have to be conveyed by him. You can only make a deed to the part relinquished by me. I wish it attended to as soon as possible. You can bring with you the deed for the portions of the estate in which the legal title vests in you. If anything prevents your coming, perhaps (I do not know) you can accomplish it by sending power of att'y to some lawyer. But of this you will advise yourself by consultation with your legal adviser.

I cannot forbear (I hope to do so in a proper spirit) alluding to your answer to the suit I was forced to bring against you. You state that I, in conjunction with others, expelled you from your estate. I asserverate on the honor of a man, that when that alleged raid was made, I was 250 miles distant, but was not in the army, as you allege. You again say that I, with, at least, three others, burned your mill. I again solemnly swear I was not in the army, nor anywhere near your
121 premises at that time. You accuse me of a violation of the contract. Now you must be aware that the moment you offered me a sum which I deemed sufficient to render the balance of the debt secure, I did release 150 acres, more or less. I know the latitude allowed to all defendants in law & chancery, and therefore have taken no offence, but was, I confess, a little surprised when I read it.

However, let all this pass now and forever. Let us settle up our matters. I will await your reply for a few weeks before leaving for Williamsburg.

Respectfully, yours,

WILLIAM WALLER.

(Indorsed:) Def't's Ex. D. July 16, '67. G. R. B.

122 *Letter from W'm Waller.*

LYNCHBURG, *Jan'y 14th*, 1867.

JAMES BIGLER, Esq.

D'R SIR: More than twelve months since I wrote you, on the reception of your answer, that in consequence of the language employed in that document, our relations could not be otherwise than unfriendly. I certainly entertained at that time, and for months after any other than kind impressions. Since then, I learn that much latitude is allowed to both plaintiff and defendant in legal controversies, and therefore determined that, should we meet, I would take the initative in speaking. Several weeks since an opportunity occurred, and you know I then addressed you by name.

I see no reason why our matters cannot be settled if we approach them in a business spirit, free from animosity and revenge. The loss of valued friends by death during the past year, has much sorrowed me, and should you meet me in a corresponding manner, I doubt not this whole controversy can be settled.

I propose that we both lay our claims before some gentleman of honour, well versed in the law. If he thinks and decides that I am morally or legally bound to pay for damages sustained by you during the war, I will comply with such decision. If what you heard about my securing money for damages for horses and mules sold, for lumber and fruit, can be proved by any man, I will agree to refund all the
123 money with interest. I know that I never received one cent from any such source or sources. Believing otherwise, I do not now blame you for your bill, filed in the United States court; but if you were deceived by others, and your charges are erroneous, surely it is the part of an honorable man to retract them. This I submit to you.

If my connection with the army of the Southern States (I was with the army from June, 1861, to February, '62) renders me in law or morals liable for injury done you, then too I am willing to abide the referee's award. I resigned in February, '62, and was at no time after a commissioned officer, but a private citizen. During the occupancy of the peninsula by Gen'l Johnston, the estate was in the hands of the military. I saw it was rapidly going to ruin. The district attorney denied my right to the land. He claimed it as belonging to the C. States, and I was driven to the expense and necessity of taking the question before Judge Hallyburton, who decided that the deed of trust gave me a better claim than any which could result from a state of war. I then authorized Mr. Saunders to sell and purchase it solely that I might protect it from the depradations of the military. In one month after this, Gen'l McClellan took possession of the peninsula, and I saw no more of the peninsula until May, 1865. Not one cent did I receive from my trustee, not one particle of timber or fruit did I ever sell, and from the
124 C. S. authorities not one dime. If you have heard otherwise I challenge the proof, and will submit it all to arbitration; but you seem to think I was of the party who were alleged to have committed depradations. If I do not satisfy you by incontestable evidence, that I was at no moment during the year '61, on the estate, then I will agree to pay damages to you. My sole object in selling & purchasing the estate was to secure it from further injury, and I distinctly declared at the time of the sale, that the land was yours at the close of the war. This fact I will substantiate by witnesses of unblemished reputation.

Then what are the points of difference between us? You were deprived of the use of your farm. If I did this, then I am willing to be

held responsible. I was also deprived of the use of the money due me. Now let this whole matter be arbitrated and settled.

If however there be any other plain to be suggested, I am willing to give to it serious reflections. If you meet this in a spirit similar to my own, then this whole difficulty can be overcome.

I will await your reply.

Respectfully, yours,

W'M WALLER.

(Indorsed:) Deft's Ex. F, G. R. B.

125 *Exhibit "X" referred to.*

New York supreme court, city and county of New York.

WILLIAM WALLER }
vs.
JAMES BIGLER. }

GENTLEMEN: You will please take notice that the plaintiff, William Waller, appeals to the general term of this court from the judgment entered in the above-entitled action, on the 17th day of October, 1867, in favor of the defendant for the sum of $1,004\frac{77}{100}$ costs upon the report of the referee therein.

Dated New York, Nov'r 4th, 1867.

Yours, &c.,

ALGERNON S. SULLIVAN,
Pl'ff's Att'y, 29 Wall st., N. Y.

TO E. L. FANCHER,
Defendant's Attorney.
W'M C. CONNER,
Clerk of the City & County of New York.

126 CITY & COUNTY OF NEW YORK:

WILLIAM WALLER, APPELLANT. }
against
JAMES BIGLER, RESPONDENT. }

Undertaking an appeal from a judgment directing the payment of money.

Whereas, on the 17th day of October, 1867, in the supreme court of the State of New York, for the city and county of New York, the above-named respondent recovered a judgment against William Waller, the above-named appellant, for $1,004\frac{77}{100}$ dollars costs; and the above-named appellant feeling ag'rieved thereby, intends to appeal therefrom to the general term of said court:

Now, therefore, we, William B. Aitkin, of No. 42 West 44 s. street, in the city of New York, and Jeremiah B. Aitkin, of No. 155th street, in the said city, do hereby, pursuant to the statute in such case made and provided, undertake that the said appellant will pay all costs and damages which may be awarded against him on said
127 appeal, not exceeding five hundred dollars, and do also undertake that the said judgment so appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the said appellant will pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be

affirmed only in part, and all damages and costs which shall be awarded against said appellant on the said appeal.

Dated New York, November 4th, 1867.

W'M B. AITKEN.
JEREMIAH B. AITKEN.

CITY & COUNTY OF NEW YORK, *ss:*

William B. Aitken, one of the subscribers to the foregoing undertaking, being duly sworn, says that he is a resident and a householder within this State, and is worth the sum of two thousand dollars over all his debts and liabilities, and exclusive of property exempt by law from execution.

W'M B. AITKEN.

Sworn to before me this 4th day of November, 1867.

JOHN T. CORNELL,
Com'r of Deeds.

128 CITY & COUNTY OF NEW YORK, *ss:*

Jeremiah B. Aitken, one of the subscribers to the undertaking, being duly sworn, says that he is a resident and householder within this State, and is worth the sum of two thousand dollars over all his debts and liabilities, and exclusive of property exempt by law from execution.

JEREMIAH B. AITKEN.

Sworn to before me this 4th day Nov'r, 1867.

JNO. T. CORNELL,
Com'r of Deeds..

CITY & COUNTY OF NEW YORK, *ss:*

I certify that, on this 4th day of November, 1867, before me, personally appeared the above-named William B. Aitken and Jeremiah B. Aitken, to me personally known, and known to me to be the individuals described in and who executed the above undertaking, and they severally acknowledged to me that they executed the same.

JOHN T. CORNELL,
Com'r of Deeds.

129 I, William C. Conner, clerk of the said city and county, and clerk of the supreme court of said State for said county, do certify that I have compared the proceedings with the original notice of appeal and undertaking on file in my office, and that the same are correct transcripts therefrom, and of the whole of such originals.

In witness whereof I have hereunto subscribed my name and affixed my official seal this twenty-third day of November, 1867.

[NEW YORK L. S. SEAL.] W'M C. CORNER,
Clerk.

(Indorsed:) Exhibit "X."

130 *Report of L. R. Marsh, referee.*

New York supreme court.

WILLIAM WALLER *ag'st* JAMES BIGLER.

L. R. Marsh, esq., referee. Hearing of June 28th, 1867. Testimony

of O. M. Smith, James Bigler. George R. Bishop, law reporter, (phonographic,) with Marsh, Cox & Wallis, 170 Broadway, N. Y.

131 New York supreme court.

WILLIAM WALLER
vs.
JAMES BIGLER.

L. R. Marsh, esq., referee. Hearing of June 28, 1867, (the referee being absent.)

O. M. SMITH, called by Mr. Hayward on behalf of defendant, & duly sworn, testifies as follows:

Q. What is your residence, your name, and age?

A. I reside in Newburgh, State of New York, and was 59 years of age last September.

Q. Were you formerly a partner of Mr. Bigler?

A. Yes, sir.

Q. In reference to this estate?

A. Yes; Virginia estate.

Q. When did you become connected with him in that estate?

A. I think about the year 1853.

Q. How long were you interested there?

A. Well, I think, as near as I can recollect, (I could not be positive with regard to the time precisely,) I think 1857 or 1858 that I
132 sold out to Mr. Bigler. I think it was 1857. I made no particular minute of it, & could not be positive, particularly, with regard to the date.

Q. Did you reside on the premises?

A. I did not reside on the premises; that is, I was there a great portion of the intermediate time between 1853 & 1857, if I am right about that time. I was off and on two or three times a year. The longest period I remained there was about three months.

Q. Were you acquainted with the improvements that were made upon the estate?

A. Considerably so, having been there at the time the improvements were made, and having the direction of them.

Q. Were you acquainted with the transactions with reference to the estate during that time?

Mr. SULLIVAN. What do you mean by transactions? Do you mean the improvements being made, or the management of the estate?

Mr. HAYWARD. Any transactions with reference to the estate at the time—any attempted sale or sales of any portion of the estate.

A. There were not any sales made, while I was there, of the
133 estate. I say none—there were sales made, but they were conditional. They were not perfected.

Q. State anything you know, from your own knowledge, with reference to those conditional sales.

A. Well, there were sales made to a gentleman by the name of Jackson (or Johnson?) and a gentleman by the name of Sterling, conditionally; that is, they agreed to pay so much money for the property which was upon the York River front, embracing the oyster ground, if we would give them a perfect title to the land, which not being able to do, the bargain fell through. We did not actually perfect the sale; that is to say, we did not succeed in giving a title.

Q. Explain what you mean by giving a title.

A. We could give the title on the condition of the original contract with Mr. Waller, who should consent to have the estate sold from time to time. We could not give the title to the estate because we could not get a release of the property.

Q. A release of the property from whom?

A. From Mr. Waller.

Q. Were there any conditional sales?

134 A. Not that I recollect during the time I was there—not personally. I was acquainted with Mr. Johnson and Mr. Sterling, and knew the circumstances.

Q. Do you know anything about a conditional sale to Matt. Waller?

A. Yes; I knew the circumstances under which Mr. Waller wanted to purchase the property.

Q. State what you know with regard to it.

A. Well, sir, the estate that we had from W'm Waller was contiguous to Dr. Matthew Waller. He wished to purchase land that was contiguous to his estate.

Mr. SULLIVAN. State what he said and what you said—not in general terms what was said.

Mr. HAYWARD. State what you know with regard to it.

A. He gave to me as an objection for not buying that we could not get a release of the property from Mr. William Waller.

Q. How much did he want to buy?

A. He proposed two conditions—600 acres, one patch, for a certain price, & 2,000 in another. I forget just the quantity; could not be positive with regard to the number of acres.

135 Q. Do you know of any attempt to get a release from Mr. W'm Waller?

A. I only know through my partner.

Q. Anything that Matt. Waller said?

(Objected to by Mr. Sullivan; taken subject to future objection.)

A. I don't know that I ever saw Matt. Waller and William Waller together—in conference together. I only know what the doctor told me. I had different interviews with Dr. Waller, trying to effect a sale, talking it over with him, (Matt. Waller.)

Q. The sale was had on condition, you say?

Mr. SULLIVAN. Let him first tell what actually was done.

A. Well, sir, that was the only condition.

Q. What was that condition?

A. The condition was that we would give him a title on a release from W'm Waller.

Q. It fell through because you were unable to obtain that?

A. Yes, sir.

Mr. SULLIVAN. It is merely from hearsay that he states that.

A. No; I know from Doctor Waller himself.

Mr. SULLIVAN. You know from Doctor Waller & not from W'm Waller?

A. Yes, sir.

136 Q. I want to ask you, Mr. Southard, what your opinion is of the rental value of that estate between the years 1861 & 1865?

Mr. SULLIVAN. Were you there on the property after 1865?

A. Well, I think I was, sir. As I remarked before, I am not very positive regarding the dates. I was there, back & forth, frequently. In 1857, about, I think, I ceased to be a partner.

Q. Go on and state your opinion in regard to the rental value of estate during the time I have mentioned.

A. I will, as near as I can. I was there during the erection of the dwellings—all of them—during the erection of the large boarding-house, which contained the store; during the erection of the principal part of the saw-mill—a large saw-mill, grist mill, and brick-yard. I had the superintendence of the mill. During the erection of several tenant buildings I was there, & during the erection those just mentioned, & cooper-shop, etc.

(Mr. Sullivan objects to the witness answering the question put to him on the ground of incompetency.)

Mr. HAYWARD. Go on.

137 A. I should state that at that time we calculated that the property was worth a rent of $7,000 a year.

Q. In your judgment?

A. Yes, sir, in my judgment, taking the store, and mill, etc.—the real estate.

Q. I want to ask what, in your opinion, the whole improvements made upon that estate prior to 1861 cost in round numbers?

(Objected to as incompetent.)

Q. State, in your opinion, what it cost.

A. I do not know. I cannot tell the positive sum that it cost. I know about the buildings, because I was there most of the time. I did not figure it up so as to tell.

Q. Will you state, to the best of your knowledge, what the dock cost?

(Objected to as incompetent. Taken subject to obj'n.)

A. I was there at the sawing of the timber. Part of my business was to keep the books, so that I did not carry with me the figures.

Q. Were you partner at the time it was built.

A. Yes.

Q. Conversant with the cost of the same?

138 A. Yes, sir, conversant with the whole. Shipped a great many cargoes of timber to the Norfolk navy yard.

Q. Will you state what was the cost?

A. I can; to the best of my judgment, I should think it cost less than $2,000.

Q. You were conversant with all the improvements made upon the estate?

A. Up to the time when I left. There may have been some improvements made there since I left.

Q. Will you state what the buildings cost up to that time?

A. It is a pretty difficult thing to come at the fair figure; if I can get at it—the amounts were handed in to our book-keeper at the time, I having returned or being in the business with Mr. Bigler at Newburgh, & I had one set of books to keep there, & could not keep both, & the figures I could not tell exactly. There was the big house, I speak of the brick boarding-house, & that contained a store; it was a building which, I should think, cost at least $10,000.

Q. The boarding-house cost $10,000?

I should think it cost all of that, according to my best judgment.

139 Q. What did the other buildings cost?

A. The other buildings were less in value—smaller buildings. I should think they would cost from 5 to 7 hundred dollars.

Q. Each?

A. Yes, sir.

Q. How many were there?

Q. Explain what you mean by giving a title.

A. We could give the title on the condition of the original contract with Mr. Waller, who should consent to have the estate sold from time to time. We could not give the title to the estate because we could not get a release of the property.

Q. A release of the property from whom?

A. From Mr. Waller.

Q. Were there any conditional sales?

134 A. Not that I recollect during the time I was there—not personally. I was acquainted with Mr. Johnson and Mr. Sterling, and knew the circumstances.

Q. Do you know anything about a conditional sale to Matt. Waller?

A. Yes; I knew the circumstances under which Mr. Waller wanted to purchase the property.

Q. State what you know with regard to it.

A. Well, sir, the estate that we had from W'm Waller was contiguous to Dr. Matthew Waller. He wished to purchase land that was contiguous to his estate.

Mr. SULLIVAN. State what he said and what you said—not in general terms what was said.

Mr. HAYWARD. State what you know with regard to it.

A. He gave to me as an objection for not buying that we could not get a release of the property from Mr. William Waller.

Q. How much did he want to buy?

A. He proposed two conditions—600 acres, one patch, for a certain price, & 2,000 in another. I forget just the quantity; could not be positive with regard to the number of acres.

135 Q. Do you know of any attempt to get a release from Mr. W'm Waller?

A. I only know through my partner.

Q. Anything that Matt. Waller said?

(Objected to by Mr. Sullivan; taken subject to future objection.)

A. I don't know that I ever saw Matt. Waller and William Waller together—in conference together. I only know what the doctor told me. I had different interviews with Dr. Waller, trying to effect a sale, talking it over with him, (Matt. Waller.)

Q. The sale was had on condition, you say?

Mr. SULLIVAN. Let him first tell what actually was done.

A. Well, sir, that was the only condition.

Q. What was that condition?

A. The condition was that we would give him a title on a release from W'm Waller.

Q. It fell through because you were unable to obtain that?

A. Yes, sir.

Mr. SULLIVAN. It is merely from hearsay that he states that.

A. No; I know from Doctor Waller himself.

Mr. SULLIVAN. You know from Doctor Waller & not from W'm Waller?

A. Yes, sir.

136 Q. I want to ask you, Mr. Southard, what your opinion is of the rental value of that estate between the years 1861 & 1865?

Mr. SULLIVAN. Were you there on the property after 1865?

A. Well, I think I was, sir. As I remarked before, I am not very positive regarding the dates. I was there, back & forth, frequently. In 1857, about, I think, I ceased to be a partner.

Q. Go on and state your opinion in regard to the rental value of estate during the time I have mentioned.

A. I will, as near as I can. I was there during the erection of the dwellings—all of them—during the erection of the large boarding-house, which contained the store; during the erection of the principal part of the saw-mill—a large saw-mill, grist mill, and brick-yard. I had the superintendence of the mill. During the erection of several tenant buildings I was there, & during the erection those just mentioned, & cooper-shop, etc.

(Mr. Sullivan objects to the witness answering the question put to him on the ground of incompetency.)

Mr. HAYWARD. Go on.

137 A. I should state that at that time we calculated that the property was worth a rent of $7,000 a year.

Q. In your judgment?

A. Yes, sir, in my judgment, taking the store, and mill, etc.—the real estate.

Q. I want to ask what, in your opinion, the whole improvements made upon that estate prior to 1861 cost in round numbers?

(Objected to as incompetent.)

Q. State, in your opinion, what it cost.

A. I do not know. I cannot tell the positive sum that it cost. I know about the buildings, because I was there most of the time. I did not figure it up so as to tell.

Q. Will you state, to the best of your knowledge, what the dock cost?

(Objected to as incompetent. Taken subject to obj'n.)

A. I was there at the sawing of the timber. Part of my business was to keep the books, so that I did not carry with me the figures.

Q. Were you partner at the time it was built.

A. Yes.

Q. Conversant with the cost of the same?

138 A. Yes, sir, conversant with the whole. Shipped a great many cargoes of timber to the Norfolk navy yard.

Q. Will you state what was the cost?

A. I can; to the best of my judgment, I should think it cost less than $2,000.

Q. You were conversant with all the improvements made upon the estate?

A. Up to the time when I left. There may have been some improvements made there since I left.

Q. Will you state what the buildings cost up to that time?

A. It is a pretty difficult thing to come at the fair figure; if I can get at it—the amounts were handed in to our book-keeper at the time, I having returned or being in the business with Mr. Bigler at Newburgh, & I had one set of books to keep there, & could not keep both, & the figures I could not tell exactly. There was the big house, I speak of the brick boarding-house, & that contained a store; it was a building which, I should think, cost at least $10,000.

Q. The boarding-house cost $10,000?

I should think it cost all of that, according to my best judgment.

139 Q. What did the other buildings cost?

A. The other buildings were less in value—smaller buildings. I should think they would cost from 5 to 7 hundred dollars.

Q. Each?

A. Yes, sir.

Q. How many were there?

A. I think there were 4 built while I was in company with Mr. Bigler.

Q. Would you put them at $2,400?

A. Yes, sir. I should think that would be about a fair price. They were little buildings for tenants. This big building, the boarding-house & store, was built of brick—expensive.

Q. Will you state what the other improvements would cost that were made while you were there as an owner?

A. I don't know as I could state now specially, sir.

Q. As near as you can state.

A. I was not connected with the soil improvements. There was some ditching & some cultivating of the soil—improvements that I could not state particularly about, & was not connected with at all. I had the direction and management of this work that I have spoken of.

140 Q. You spoke of a portion that Dr. Matt Waller wished to purchase. Was that less or more valuable than the rest of the estate?

A. Well, sir, I don't know whether it was less valuable, taking the whole estate through. There was some part of the portion that he talked of buying that must be more valuable than the other. If I recollect right his conversation was, that he would give 30 dollars an acre for 600 acres, and 24 or 25 dollars an acre for 2,400 acres. He considered one part a little better, yet it would run pretty generally through alike, as far as my recollection and examination serve me. I purchased the estate originally, and travelled the whole ground over myself; but it is pretty difficult for a man to come to a conclusion in regard to the parts of it.

Q. Were you connected with Mr. Bigler when he purchased?

A. Yes, sir.

Q. Were you knowing to the negotiation & the purchase?

A. I was there & negotiated & drew the articles, in company with Mr. Hammond, who was the agent of Mr. Ja's Bigler at the

141 time.

Q. Will you read that contract set *only* in the defendant's answer? (handing paper to witness.) Was that a copy of the agreement for the sale of the estate between the parties?

A. Yes, sir. That, (handing paper to Mr. Hammond,) is the article I drew, in my own handwriting. I wrote it myself and swear it is a copy.

Mr. SULLIVAN. You have sworn that this is a copy, (referring to answer.)

A. No, I don't swear it is. I think it is. I drew this copy, (the other paper,) myself; that makes me safe about. I brought it along with me.

Q. Will you look at that, (showing paper produced by witness himself a moment ago,) & state whether it is a copy of the agreement for the sale of the estate—the agreement between the parties.

(Objected to. Taken subject to objection.)

A. Yes, sir. I will swear to it positively, and I will guarantee that it don't vary a word from that in the answer. I swear that it is a copy of that made with my own hand.

142 Q. You wrote it yourself?

A. I wrote it myself. I will swear to that—in the presence of Mr. Waller & Mr. Hammond. (Mr. Hayward offers the paper in evidence. Mr. Sullivan objects, that there is no proof that the original is lost.)

(Deft's Ex. 1 June 28, '67. Marked Deft's Ex. I of June 28, '67.)

Q. Was the purchase of the place based upon that agreement?

A. It was, sir. This was the purchase of the place; this was the contract.

Q. Was there any other contract made subsequent to this in its place or stead?

A. Not to my knowledge.

Q. Were you present at the time the deed was passed for the property?

A. I was not. I was at Newburgh, N. Y. Mr. Bigler, my partner, was present, with Mr. Hammond, his agent.

Cross-examination:

Q. Who was Dr. Matt. Waller?

A. He was a cousin of William Waller; that is the most I know about it. He belonged to the family of old Dr. Waller, of Williams-
143 burg.

Q. He lived on the land adjoining the Bigler farm, did he?

A. Yes, sir; south of it.

Q. Was there any agreement in writing between him and Mr. Bigler & yourself with reference to the proposed purchase that you have spoken about?

A. Never, sir, to my knowledge; no agreement in writing.

Q. Was there any consideration or forfeit-money to pay by him to Bigler or yourself?

A. No, sir; not to my knowledge. I was there.

Q. Were you on or near the farm between 1860 & 1865?

A. I haven't been on the farm since 1860; it was previous to 1860 that I left it.

Q. How long before 1860 was the last time you were there?

A. As I stated before, I could not be positive whether it was 1857 or 1858 that I left. It was one of those dates.

Q. Then you know nothing about the condition & rentable value of the property after 1858, except what you may have heard from the reports of others?

A. I have based my opinion on what it was when I was there.

144 Q. As to the condition of the property from 1860 on, in respect to anything that would affect its rentable value, you know nothing except what you heard from others?

A. No, sir; I was not there.

Q. What would have been the rentable value of the estate in the condition in which you left it, or if it was the locality of armies contending, and destroyed the entire peace of the neighborhood, preventing its use and occupancy all the time?

(Objected to; taken subject to objection.)

A. Well, sir, I merely answer that I don't know; it is impossible for me to understand how to make such an estimate; I could not estimate the value of the use of that estate when it was occupied by armies shedding blood & fighting & destroying, because I was not there.

Q. In your opinion would that effect it or not?

A. I should think it would; but, then, the amount I cannot tell.

Q. What was the extent of your interest in the farm while you were there?

A. One-eight' only, I think.

Q. Was the farm ever rented out with all these improvements on it?

A. No, sir; not entirely; (never rented the mill.)

Q. Were the buildings rented?

145 A. Yes, sir; all rented except the public house, the boarding-house, called a public house; it was built for that purpose.

Q. Was the mill let?

A. Yes; I won't be positive whether the mill was rented while I was there or not. I think not. The saw-mill & grist-mill we used ourselves; but, subsequent to my departure, it was rented.

Q. That is you heard so?

A. No, I did not hear so. I know it was talked of while I was there, & we did not get our price.

Q. Do you know, except from what you heard, that it was rented?

A. According to my best recollection, I don't remember that it was ever rented. I remember ——

Q. (Interrupting.) If you don't remember don't state,

A. I only remember the thing was talked of; we did not rent it while I was there.

Q. Was the dock ever rented while you was there?

A. No, sir; not that I remember.

Q. Your estimate as to what the rental value of the property was, was based upon what the cost of the improvements & of the farm had been, wasn't it?

A. Not entirely, sir; my estimate of the rent was based upon
146 the amount of business we were doing—the brick-making, the lumber-sawing, the corn-grinding, and the use of the land. It is only my opinion. I never had had any talk with anybody about it. At any rate, that is what I told the man I would take for the use of it, and he promised to give me an answer in a month and didn't do it. I have the same opinion about it now that I had then.

Q. Is Dr. Matt. Waller living?

A. No, sir; I understand that he is dead. I was well acquainted with Dr. Waller.

Q. Did you make this copy (Exhibit 1 of this date) at the time the original was executed?

A. Yes, sir; it is the copy I brought from Virginia.

Q. It is complete; contains everything?

A. Yes; anything that can be found more than that must have been made subsequent to my leaving. It is in my own handwriting. I myself was in the mill at the time. Mr. Waller and I had quite a time in drawing it up. He insisted that I should draw it, and I did.

JAMES BIGLER recalled by pl'ffs counsel, and further examined, testifies as follows:

Q. Have you read Mr. Waller's testimony?

147 A. I have.

Q. I wish you to state whether there was any second contract with reference to the purchase of that estate by you of him?

A. I am not aware there was any subsequent contract. I don't remember any. The purchase was based upon the contract made by my agent, Mr. Hammond.

Q. You say there was no second one made?

A. Never, to my knowledge. This was the one that was carried out. I paid him ($)5,000 dollars, though, instead of 3,000 dollars. That only left a less amount to be paid. That is all the difference.

Q. Has the place been sold at the present time?

A. I have agreed with a party to take the place, which he hasn't done yet.

Q. No conveyance has been made?

A. No, sir.

Q. Then you do not wish to be understood that you had sold it.

A. I did not sell it. It has not passed out of my hands. I have only

agreed with a party, & they hav'n't complied with their agreement. They agreed to purchase it, but havn't done so yet. I have never give' any title to it.

148 Q. Have you received any rent from that estate during the time you were out of possession of it—between the years 1861 & 1865?

A. Not one cent. (I was on the place in the spring of 1865 and saw the tenants, & asked by what authority they were on that place, and they told me that they hired it of Mr. Waller's agent,) (objected to,) whom they were going to pay the rent to.

(Objected to what transpired between Mr. Bigler and these tenants, so-called, unless Mr. Waller was present.)

When I got possession of the place from General Ludlow I went down to the place, and I saw several men on the place who were occupying different portions of the land. I saw one man getting rails. I asked by what authority he was on that place, & what he was doing. He told me that hired the property of Mr. Waller's agent, (objected to,) and should pay the rent.

Q. Have you read Mr. Waller's testimony with reference to the conversation had between you & Mr. Waller, at Williamsburg, in June 1865?

A. It was in May.

149 Q. Will you state whether that was true or not?

A. Well, part of it is true, and part of it is not true. The fact is that he saw me there; but that I admitted that I owed him, or said I would pay him, there is not a word of truth in.

Q. State what did transpire.

A. I think that I did state that in the former testimony.

Q. Will you state whether you introduced him to the gentleman who was with you?

A. I did, to my partner, Mr. Southard, who was present during all the conversation.

Q. You say that his version of the testimony is not true?

A. It is entirely one-sided—not true—that part of it is not. In regard to the confiscation of the lands by Congress, there was no such talk at all.

Q. There is some testimony in your direct examination & some by Mr. Waller, in reference to the damage occasioned to you by the loss of the sale of those river lots. Will you state what damage you experienced by the loss of the sale of those lots?

150 (Objected to, as having already been testified about by this witness; and because also the mode proposed of contradicting Mr. Waller is not correct. Taken subject to objection.)

A. I lost, in consequence of not making that sale at that time that I demanded the title, and offered to pay Mr. Waller the money I received. I lost $2,000 by not making the sale of them. It was a very great damage to me otherwise, and in dollars and cents I cannot compute it.

Q. Did Waller afterwards release to you 150 acres?

A. He released to me an indefinite number of acres. He released a certain strip of land, commencing at a point below the mill running to Cappahosia. I never had the acres computed.

Q. Was it about 50 acres?

A. I should say 100 acres; it may have been 150 acres.

Q. Was that all that he released to you of the estate?

A. That was all that he released at that time.

Q. Did he ever release those village lots?

A. No; none of them.

Q. Then this 100 or 150 acres did not include the village lots?

151 A. No, sir.

Q. What was the rental of that estate worth from April 19, 1861, to May, 1865?

A. I have looked over that matter. I consider the rent of it per year a cheap rent at $7,000, including the mill, farm, store, and dwellings and oyster fronts—including all the property.

Q. I understand you to say that Matt. Waller's sale fell through, through refusal of William Waller to release?

(Objected to as incompetent and as leading; that he can be asked by deft's counsel about any facts about that sale that he has not already testified to.)

Q. If you have any additional facts with reference to that matter, state them.

A. I consider that it was in consequence of Mr. Waller's unwillingness to release that the property was not sold to Matt. Waller.

Q. In your opinion, what is the value of the estate at the present time?

(Objected to; taken subject to objection.)

Q. What was the value of it in May, 1865?

152 A. I took an account of my stock, my yearly estimate of values of property, & I put that property down in 1865 at $40,000. It was very cheap at the price I bought it. It would have brought $40,000, I think, easily. That was soon after I got possession of it that I put it down at $40,000.

Q. You say you contracted to sell it for $30,000?

A. Yes.

Q. Have you at any time admitted to Mr. Waller that you owed him this money?

A. No, sir; I have not.

Cross-examined:

Q. Was the trust deed executed by you after this original contract dated 2nd April, 1853?

A. Yes, sir.

Q. Wasn't this a second contract with reference to the land?

A. No, sir; it was the carrying out of the contract. He covenanted to give me a deed of it.

Q. You hav'n't answered my question.

A. I did not consider it in that way.

Q. Was there ever any memorandum made or signed by you to the effect of, or containing the words: "The said Waller agrees that the said Bigler shall sell the land as he may see fit, provided it does not operate a serious reduction to the security afforded by the trust deed."

153 A. No, sir; never signed any such deed to my knowledge, or any such contract or memorandum.

Q. Did you ever receive such a one from Mr. Waller?

A. No, sir; only the one original signed by Mr. Hammond as my agent. I never saw such a paper as that, to my knowledge. Mr. Hammond was my agent at the time, doing this business—has written instructions from me to buy this place from Mr. Waller.

Q. To make this contract?

A. Yes, sir; that contract was sent to me, submitted to me, and approved by me, & Mr. Hammond then went and executed it.

Q. Did Mr. W'm Waller ever tell you that he declined to assent to release his trust deed upon portions of land, upon the ground that such a release would impair the value of his security?

A. No, sir; he said he would not have the place cut up.

Q. Was that all that he said?

A. He said he was going to be the judge of what would impair his security, & he would not—he was not going to have it sold that way. He did not say it would impair his security.

Q. Then when he made the remark, what did you reply about
154 impairing the value of the security?

A. I said he had made the contract, & I thought he ought to stand up to it.

Q. That is not the answer. When he said that he would be the judge whether it would impair the value of the security, what did he say whether it would impair the value of the security or not?

A. He did not say anything about impairing the security, except that he should be the judge of that. Said I: "I will give you all the money I receive for the place, and it won't take long to pay the entire amount, & then you certainly may be secure"—at the rate I offered it.

Q. Then the question as to whether the value of the security would be impaired, was discussed as you now state between you?

A. No, the discussion was about cutting the place up.

Q. Then the discussion was, as you now state it, you saying: "I will pay you the money as fast as I sell," and he saying, "No, I will be the judge of that."

A. "I will not have the place cut up; I will judge about securities."

Q. Was the subject of improving the value of the security discussed between you & him any further than you have now stated?

A. I think that is about the substance of it, sir.

Q. In giving your estimate of the rental value of the farm do you apply that to the property, as it was before the war broke out?

155 A. My idea is what it was when I left the place—when my folks left the place, the condition it was in—I never saw it after that until I saw it in May, 1865.

Q. And you make that opinion, not only on the supposition that the farm continued in the same condition, but that the circumstances around it continued the same after the war?

A. Well, that might be; the circumstances of the war might have made the mill worth nothing, & might, on the other hand, have doubled the value of it. My mill here was doubly valuable during the war, and that there would have been if I could have been there to attend to it.

Q. Would you have sold to the confederate government?

A. Well, that is a question I would not like to answer. I would not, though. But if I could have got to the mill I could have made it doubly valuable furnishing our own Government. I undertook to get there in 1863 & could not get there.

Adjourned to Tuesday, the 2nd of July, 1867, at 1 o'clock, p. m.

156 The objection of the defendant to the deposition of Mr. Bigler being read is of no moment, as he has already permitted his own evidence to be filed, as defendant, and thereby sustaining the practice of the State courts allowing the parties, plaintiff & defendant, to testify in their own cases, which is now the practice of this court. But if the practice was otherwise, it would seem very unfair in the defendant to seek to use his own evidence and cut the plaintiff off from the same privilege.

J. H. SANDS,
Counsel for Plaintiff.

OCT. 5TH, 1867.

The deposition & statements of James Bigler contained herein we excepted to as evidence in the case, on the ground that he is an incompetent witness, being the plaintiff on the record, & having a direct interest to speak in his own behalf; and the exceptions to the questions & answers taken by Mr. Sullivan, in the course of his examinatin, & the examination of the witness O. M. Smith, are hereby renewed.

JAMES ALFRED JONES,
Counsel for the Defendants.

OCT. 5TH, 1867.

1867, Nov. 2nd, rec'd in office, & filed.

(Indorsed:) Bigler's Exhibit. No. 8. Filed. Geo. Chahoon, commissioner.

157 *Report of Marsh, referee.*

New York supreme court.

WILLIAM WALLER *ag't* JAMES BIGLER. } Reference.

Luther R. Marsh, esq., referee. Hearing of July 23rd, 1867. Testimony of W'm Waller, pl'ff, (recalled, and further examined by Mr. Sullivan, his counsel.) Geo. R. Bishop, law reporter, (phonographic,) with Marsh, Coe & Wallis, 170 Broadway, N. Y. City.

158 N. Y. supreme court.

W'M WALLER *vs.* JAMES BIGLER. }

L. R. Marsh, esq., referee. July 23rd, 1867.

Pl'ff's Ex. No. 1, July 23rd, '67.

Mr. Sullivan offers in evidence a letter from def't to pl't'ff, marked Pl'ff's Ex. No. 1, July 23rd, 1867. G. R. B.

Pl'ff's Ex. No. 2, this date.

Also another letter from def't to pl'ff, marked Pl'ff's Ex. No. 2, July 23rd, '67.

WILLIAM WALLER, recalled by Mr. Sullivan, & further examined, testifies as follows:

Q. During the year 1867, what offer, if any, in relation to the selling of the farm, was made to you by Mr. Bigler?

A. Mr. Bigler offered to sell me the estate.

Mr. HAYWARD. Was this in writing?

A. Yes, sir.

(Mr. Hayward objects to going into the contents of the writing,
159 or stating what the offer was, without anterior proof of the fact of the writing.)

Q. Was there any conversations with him—between you and him?

A. Not conversation, but correspondence.

Q. Did you or did you not ever decline to release any portion of the farm that it might be sold to Dr. Matt. Waller?

A. I never in my life heard of any proposition to Matt. Waller from Mr. Bigler, or from Mr. Bigler to him. I was very anxious for Geo. Tazewell——

(Witness states further, but the reporter does not understand, & asks him to repeat what he said.

Mr. Hayward objects to it on the ground of irrelevancy. Taken subject to objection.)

A. I repeatedly offered the estate to Geo. Tazewell, the father-in-law of Doctor Waller, (Matt. Waller,) at $25,000 before I sold it to Mr. Bigler at $30,000.

Q. Did you ever tell Dr. Matt. Waller not to buy any portion of said farm from Bigler, or express any opinion that Mr. Bigler would
160 fail, or his title not be good, or anything of that nature?

A. I never heard of anything in the world between Matt. Waller and Bigler about the land in my life.

(Question repeated.)

A. No; I did not.

Q. When Mr. Southard was at the farm in 1865, on the occasion when you met Mr. Bigler, what opportunities did Southard have to go over the estate?

A. Mr. Southard and Mr. Bigler got to Williamsburg one morning. They went down to the estate that evening, and the next day they went to Petersburg. I went to Richmond, and came up on the boat with them.

(Mr. Sullivan notifies Mr. Hayward to produce letter of Mr. Waller's to Mr. Bigler, dated May 3rd, 1860.

Mr. Hayward accepts oral notice.

Mr. Sullivan proposes to ask a few questions, with the under-
161 standing that if the letter just called for shall be produced, the testimony shall not be regarded as part of the record.)

Q. Looking at the letter of May 12th, 1860, you will see that it refers to a letter from you. What was the subject of that correspondence?

A. That—the other matter—was a settlement of the entire claim. I proposed to Mr. Bigler that if he would pay me the $13,000 due, that I would take off six per cent., and his letter—this letter—is in reply to that proposition of mine. He had then reduced it, as this will show, 18,000; there was a thousand of principal, $840 of interest, or $14,000. He owed me $13,000 after making this payment. I then wrote the proposition to him, that if he would pay the $13,000 I would take off six per cent.; & this letter is in reply to that proposition.

Q. This letter of May 12th is a reply to it?

A. Yes, sir; this letter of May 12th, 1860.

Q. In your former examination you spoke of a second memoran-
162 dum of agreement with reference to the terms upon which you would release portions of this estate from the effect of the deed of trust. State when, & upon what instrument, that second agreement was made?

A. The second agreement was about the 22nd of June, 1853; allusion is made to it in the trust deed. By the first agreement Mr. Bigler was to pay me $3,000; by the last agreement he was to pay me $3,000, which was done by him; it varied from the first in some other respects or particulars, as well as varied from it in this particular.

Q. On what paper or instrument was it made?

A. I said it was incorporated in the trust deed.
Q. By whom was it signed?
A. By Mr. Hammond and myself; it was written by Mr. Hammond.
Q. By Mr. Hammond as what?
A. As Mr. Bigler's agent.
Q. What money, if any, did Mr. Bigler ever offer to pay you on account of any sales of any portion of that farm?
163 A. Mr. Bigler never offered to pay me anything, except a thousand dollars for 20 acres, 50 dollars an acre, which I declined; that is the only offer he ever made me with reference to releasing the land at all.
Q. What was the rental value of that farm, in the condition in which it was, worth from April 19th, 1861, to May, 1865?
A. I do not understand the question; do you mean for agricultural purposes, or cutting timber from the land?
Q. I put the question to you as it was put upon the former examination by the opposing counsel, to Mr. Bigler; I don't think you quite get the meaning of it.
Q. (Repeating.) Under the circumstances & the condition of things prevailing from April 19th, 1861, to May, 1865, for agricultural purposes, what could that estate probably have been rented for per annum?
A. I would not pay $200 a year for it; I will give my reason.
Q. Go on.
A. My reason is, that any property that was put upon the land, anything made on it, was subject to be destroyed by both armies, that of Gen. McClellan and that of Gen. Johnson, or by raids from
164 either army, and I would not have exposed property there; I would not have rented it on any terms—would not have had my property there, because it would have been liable to be destroyed at any time.
Q. During that period and under the circumstances referred to, what would have been the probable rental of the said farm, including the store & dwellings & oyster fronts?
A. Well, sir, the same objection applies, that it would have been subject to raids from either army; I would not expose my property there at all; I would not rent it, under such circumstances, on any terms.
Q. Do you apply that remark or opinion to this property alone, or to property in that section?
A. All that section of country. It was utterly destroyed—a large portion of that country—destroyed—utterly ruined.
Q For renting purposes to the owner, what was the probable value per annum of the mill located on that farm during that period.
A. The rental privileges?
Q. Yes, sir.
A. Do you mean for cutting timber?
165 Q. Without permission to cut timber from the land.
A. I would not suppose, sir, it could be rented at all.
Q. Why?
A. Simply because there was no timber anywhere in that neighborhood that could have been purchased, & the mill, of course, would have been worthless unless timber could have been got; Mr. Bigler had timber on his farm; he bought it chiefly for the timber, I believe; there were 15 hundred acres of timber land on it; the balance was marsh and cleared land. If you ask me what I think the farm would rent for before the war, I think I can answer that.

Q. What would the farm, improved as it was by Mr. Bigler, have rented for prior to the war?

A. For agricultural purposes, sir, I should suppose $1,000 a year, & I will give my reason for saying that.

Q. Give it.

A. There are about 600 acres of cleared land, & land there of that character was worth a rental of about 2 dollars an acre; I have rented it for less than that; I rented the estate which was subsequently
166 resided on by Doctor Waller; it was purchased by me & sold to Gov. Tazewell, who gave it to his daughter, who was the wife of Doct. M. P. Waller; I rented of Dr. Matt. Waller a farm sold to Gov. Tazewell, containing 500 acres of cleared, for 500 dollars per annum, the land being much the same quality and character as Mr. Bigler's.

Q. $2 an acre for the Bigler land would be a fair price—the cleared land?

A. Yes, sir; I think that would be a fair value.

Q. Including the oyster front & the buildings, what was the fair rental value of the farm before the war, in your opinion?

A. Well, sir, I suppose about $2,000, including the store and all the other buildings.

Q. Before the war?

A. Yes, sir; I cannot tell positively, but that is my impression.

Q. What was the fair value of the farm, with the improvements, in your judgment, before the war?

A. I declined to bid $25,000 for it.

Q. When?

167 A. In 1856; I think that was the year Mr. Ramsdell purchased; it was at the sale at which he purchased that I declined to buying at that; I think it was 1856; I will not be positive, sir.

Q. Were all the improvements—all that have been referred to by Mr. Bigler, then on the farm?

A. All were on the farm, sir.

Q. What was it then bid in for at public sale?

A. $25,000.

Q. What was the value of the farm in May, 1865, in your opinion?

A. I offered Mr. Bigler $20,000 for it if he would take this claim. Mr. Bigler's first offer was $25,000; this I declined; he offered the estate again at $20,000 in Dec., 1865, and also to throw in $5,000 of bonds due him by Sterling, Johnson, Fort, & others, to whom he had sold land. He offered it to me at $25,000, which I refuse to give; he offered it to me for $20,000, in his letter of December 4th, 1865; I told him I would take the farm at that rate, if he would take this claim on payment, as far as it would go.

Q. What were your relations to Matt. Waller?

(Objected to, and taken subject to objection.)

A. He was my double first cousin, his father and my father being brothers, & his mother and my mother being sisters; he was
168 raised by my mother, & I know that if he had had any intention of buying that farm he would have come to me first.

Adjourned to Friday next, at 10 a. m., for summing up.

169 (Indorsed:) Bigler's Exhibit No. 11. Filed. Geo. Chahoon, commissioner. Report. Marsh, referee. 1867, Nov. 2nd. Rec'd in office and filed.

170 And at another day, to wit, Tuesday, the 26 day of November, 1867, on the motion of the plaintiff, by his counsel, it is ordered that this cause be set down for hearing on Friday, the 20th day of December next.

171 And now at this day, to wit, in the circuit court of the United States of America for the district of Virginia, Tuesday, January 7th, 1868.

JAMES BIGLER, PLAINTIFF,
vs.
WILLIAM WALLER AND ROBERT SAUNDERS, trustee, defendants.

This cause came on to be further heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz: That the exceptions to the report of Commissioner Chahoon in this case are overruled, and that the said report is approved and confirmed, and that the said bond of $25,000, given by James Bigler to William Waller, and dated May 10th, 1853, has been fully paid, and that James Bigler, the plaintiff, recover of William Waller, one of the defendants, the sum of twenty-six thousand one hundred and eighty-six dollars, with interest at six per centum per annum,
172 from the 3rd day of April, 1865, this sum being due from William Waller, defendant, to James Bigler, plaintiff; and the said James Bigler, plaintiff, shall have judgement and execution against the said William Waller, defendant, for the said sum of $26,186 and for his costs by him in this behalf expended. And that the defendant, Robert Saunders, as such trustee, shall release and convey unto the said James Bigler, or to whom he may designate as grantee of said estate, with special warranty, the said estate in the bill and proceedings mentioned, not released by said Waller from said deed of trust, in which deed said defendant, William Waller, shall unite; and said Saunders shall report the fact of his said release to this court within thirty days from the time of being served, with a copy of this decree; and that the defendant, William Waller, deliver up, within fifteen days after the entering of this decree, to James Bigler, the plaintiff, the said bond of $25,000 given on account of the money for said land, which bond has
173 been fully paid, and that the injunction heretofore existing in this suit against said defendants, Saunders and Waller, be continued in full force and effect until this decree be fully complied with by said Waller & Saunders, defendants, in every particular.

JOHN C. UNDERWOOD,
U. S. Dis't Judge.

JANUARY 7, 1868.

174 (Indorsed:) U. S. cir. c't., dis't Va. James Bigler v. William Waller et al. Decree. Ent'd Jan'y 7, 1868, "A," page 160. W. H. Barry, clerk.

175 *Petition and order setting aside decree.*

To the Hon. J. C. Underwood, judge circ. court, U. S. for the district of Va.:

The petition of W'm Waller respectfully represents, that the case of Bigler against him, pending on the chancery side of this court,

came to a hearing without argument from his counsel, who were not aware that it was under consideration; and that in view of this fact, & the magnitude of the interests involved, he desires a rehearing, and prays that the same may be granted to him; that the decree heretofore made in the cause may, with a view thereto, be set aside, & the cause continued, or a day apppointed for the argument.

W'M WALLER.

The decree in the case of Bigler vs. Waller, heretofore rendered in this court, without argument on the part of the defendant, is hereby set aside, and argument will be heard at the May term of the U. S. circuit court, & all proceedings, in the meantime, will be stayed.

JOHN C. UNDERWOOD.

Richmond, March 13, 1868.

176 And at another day, to wit, Thursday, the 12th of March, A. D. 1868, on motion of defendants, by counsel, it is ordered, that the decree entered in this cause on the 7th day of January last, (without argument on the part of defendants) be, and the same is hereby, set aside, and argument will be heard at the May term of the U. S. circuit court, and all proceedings in the meantime will be stayed.

177 And at another day, to wit, at a circuit court of the United States for said district, held on the 18th day of February, 1869, came the defendants, by counsel, and suggested the death of Robert Saunders, one of the defendants in this cause, which is ordered to be so certified of record; and it is ordered by the court that proper process issue to revive this suit in the name of Moses R. Harrell, committee and administrator of said Robert Saunders, dec'd.

178 *Process of revivor against Ro. Saunders' committee.*

Chancery subpœna.

UNITED STATES OF AMERICA,
District of Virginia, ss:

The President of the United States of America to Moses R. Harrell, committee, & administrator of Robert Saunders, dec'd, greeting:

We command you and every one of you, that you appear before our judges of our circuit court of the United States of America for the district of Virginia, at the court-room in the custom-house in the city Richmond, in said district, on the first Monday in the month of April next, to answer the bill of complaint of James Bigler, filed in the clerk's office of said court, in said city of Richmond, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshall of the district of Virginia to execute.

Witness, the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Richmond aforesaid, this 30th day of March, in the year of our Lord one thousand eight hundred and sixty-nine, and of our independence the 93rd.

W'M H. BARRY, *Clerk.*

179 Memorandum: The above-named defendant is notified that unless he enters his appearance in the clerk's office of said court, at Richmond aforesaid, on or before the day to which the above writ

is returnable, the complaint will be taken against him as confessed, and a decree entered accordingly.

W'M H. BARRY, *Clerk.*

180 U. S. MARSHAL'S OFFICE,
Richmond, Va., Mar. 30th, 1869.

I hereby depute the sergeant of Williamsburg or his deputy as a special deputy to execute this writ, and make return in due form.

CH'S VAN WINKLE,
U. S. Marshal.

Executed this 31st day of March, 1869, by delivering to M. R. Harrell, committee or administrator of Ro. Saunders, dec'd, the within-named defendant, in person, a true copy of this writ.

M. R. HARRELL, J'R,
Special Deputy Marshal,
For CH'S VAN WINKLE,
U. S. Marshal.

(Indorsed:) No. . Circuit court of the United States, district of Virginia. Ja's Bigler vs. Saunders, adm'or. Chancery subpœna. Retu'nable April rules, A. D. 1869. W'm H. Barry, clerk. Filed A. D. 186'. , clerk. Ja's Alfred Jones, comp't sol.

181 And at another day, to wit, Monday, May 17, 1869, it is ordered by the court that this cause be continued until the next term, to await the decision of the cause pending in the superior court of New York.

182 *Record of suit in New York.*

{ NEW YORK } The people of the State of New York, by the grace of
{ SEAL. } God free and independent, to all whom these presents shall come, or may concern, greeting:

Know ye, that we, having examined the records and files in the office of the clerk of the county of New York, and the clerk of the supreme court of the said state for said county, do find a certain judgment roll, there remaining in the words and figures following to wit:

Summons for a money demand on contract.

WILLIAM WALLER, PLAINTIFF,
against
JAMES BIGLER, DEFENDANT.

[U. S. R. stamp, 50 cents cancelled.]

To the defendant above-named:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said complainant on the subscriber at his office, No. 29 Wall street, in said city of New York, within twenty
183 days after the service hereof, exclusive of the day of such service; and if you fail to answer the complaint within the time aforesaid, the plaintiff in this action will take judgment against you for the sum

of thirteen thousand dollars with interest from the tenth day of May, one thousand eight hundred and sixty, besides the costs of this action.

Dated November 11th, 1865.

ALGERON S. SULLIVAN,
Pl'ff's Att'y, 29 Wall st.

Supreme court, city and county of New York.

WILLIAM WALLER *ag't.* JAMES BIGLER,

The above-named plaintiff complains of the above-named defendant, and says that, on the tenth day of May, A. D. 1853, the said defendant made his certain bond or writing obligatory, sealed with his seal, and in the words and figures following, to wit:

[$25,000 00.]

"This paper witnesseth that I, James Bigler, of the State of New
184 York, a resident of Newburgh, in that State, am indebted to William Waller, in the sum of twenty-five thousand dollars, which I promise to pay within ten years after this date, and at the periods of time specified in a contract drawn up and signed by myself through my agent, M. H. Hammond, and by William Waller, in his own behalf, and I further promise and bind myself and legal representatives, to pay interest on this debt of twenty-five thousand dollars at the rate of six per centum per annum, punctually, at the expiration of each year.

"Witness my hand and seal, this the tenth day of May, one thousand eight hundred and fifty-three.

"J. BIGLER." [SEAL.]

And the plaintiff further alleges that by the terms of the contract mentioned in said bond, it was specified and agreed that the said defendant would pay the said amount of twenty-five thousand dollars at the periods of time, and in installments as follows, viz: That, until the tenth day of May, A. D. 1863, one thousand dollars of principal,
and the accrued annual interest at the rate of six per centum
185 per annum, on the entire unpaid balance of principal of said debt, should be paid by said defendants on the tenth day of May, of each and every year; but that, on the said tenth day of May, A. D. 1863, the balance of said principal debt then remaining unpaid, and the accrued interest should all be paid by said defendant.

And the plaintiff further alleges that the said bond was executed and delivered by the said defendant to said plaintiff, as a part of the consideration for the purchase of a tract of land which plaintiff had sold and conveyed to him. And plaintiff further alleges that, subsequent to the execution and delivery of said writing obligatory, from time to time said defendant made payments of principal and interest thereon, so that, on the tenth day of May, A. D. 1861, there was due and unpaid on account of said principal debt, the sum of thirteen thousand dollars, and interest thereon for the period of one year then last past; and plaintiff alleges that, although payment thereof has often been
requested, no part of said sum of thirteen thousand dollars, with
186 interest thereon from *from* the tenth day of May, A. D. 1860, and interest on each annual instalment of interest from the time it became due to said plaintiff by said defendant.

Wherefore the plaintiff demands judgment against said defendant for said sum of thirteen thousand dollars with interest thereon from the tenth day of May, 1860, besides the costs of this action.

ALGERNON S. SULLIVAN,
Pl'ff's Att'y, 29 Wall st.

CITY AND COUNTY OF NEW YORK, *ss:*

Before me personally came William Waller, the plaintiff above named, who, having first been duly sworn, makes oath and says, that the foregoing complaint is true, except as to the matters stated therein on information and belief, and as to those matters he believes it to be true.

WILLIAM WALLER.

Sworn before me this 11th day of November, 1865.

J. SOLES RITTERBAND,
Notary Public, New York County.

187 *Answer of defendant.*

Supreme court of the State of New York, city and county of New York.

WILLIAM WALLER
against
JAMES BIGLER.

The answer of the defendant above named to the complaint of the plaintiff in this action:

First. For a counter-claim in this behalf existing in favor of said defendant and against said plaintiff arising out of the contract or transaction set forth in the complaint, and also connected with the subject of this action, this defendant states.

1. That, on or about the second day of April, 1853, a contract in writing, and dated on that day, was executed by and between the said plaintiff and the said defendant, under their respective hands and seals, (the same being executed for the defendant by F. W. Hammond, his attorney-in-fact thereto duly authorized,) and which contract in writing thus executed was, immediately upon such execution, duly delivered by each of the parties thereto, and became thereupon of full force and effect, and of which contract in writing the following is a copy,
188 to wit:

Copy.

This memorandum of a contract made and entered into on this second day of April, 1853, between William Waller, of the State of Va., of the one part, and Mr. James Bigler, of Newburg, State of New York, through his agent, F. W. Hammond, of the second part, witnesseth: That the said Waller agrees to sell to said Bigler the estate of said Waller for the sum of thirty thousand dollars ($30,000) on the following terms, to wit: Three thousand dollars before conveyance is made; the second payment at the expiration of two years—two thousand dollars, or more, at the option of the purchaser; and annually thereafter one thousand dollars, or more, at the option of the purchaser, until the whole shall have been paid; the time for the liquidation of the whole amount not to exceed ten years. It is also agreed

that the said Waller will allow said Bigler to sell such portions of the land as he may see fit from time to time, the said Bigler paying over to the said Waller such proceeds of the sales as will afford ample security for the liquidation of the residue of the debt due for the
189 purchase of said estate from said Waller. It is also agreed that the crops now on the land shall be included in said sale and be reaped by said Waller, provided said Waller does not sell his slaves to leave the estate before the time of harvest arrives.

Given under our hands and seals this second day of April, one thousand eight hundred and fifty-three.

WILLIAM WALLER. [SEAL.]
F. W. HAMMOND, [SEAL.]
For J. Bigler.

Teste:
H. M. WALLER.

It is understood by the contracting parties that interest on the purchase-money shall commence to run until conveyance is made.

WILLIAM WALLER. [SEAL.]
F. W. HAMMOND. [SEAL.]

Teste:
H. M. WALLER.

That the said contract in writing of which a copy is above set forth is the same contract mentioned in the bond or writing obligatory set forth in the complaint and contained mutual stipulations and covenants.

That one of the stipulations and covenants therein contained to be observed and kept by and on the part of the said plaintiff is the following, to wit: It is also agreed that the said Waller will allow said
190 Bigler to sell portions of the land as he may see fit from time to time, the said Bigler paying over to said Waller such proceeds of the sales as will afford ample security for the liquidation of the residue of the debt due for the purchase of said estate from said Waller.

That, after the execution and delivery of the said contract and of the said bond or writing obligatory, and while the contract was in full force and effect, the said defendant bargained and agreed to sell to several persons, respectively, portions of said estate or lands, to wit: In the year 1854, a certain portion of about three or four acres to Capt. John Sterling, at the price of $300 p'r acre; and thereafter another portion to one Capt. Johnson; and thereafter other portions to other parties at proper and advantageous prices therefore; and thereupon and in respect of each and every of said sales, the defendant made due and repeated application to the plaintiff to be allowed to perfect and carry out such said sales respectively, offering to pay over to the plaintiff the whole proceeds of such sales, and to pay to the plaintiff such sums as would afford ample security, with his lien on the residue of the
191 land, for the liquidation and payment of the residue of the said debt due to the plaintiff; but the said plaintiff arbitrarily and contrary to and in violation of the terms, as well as the tenor and meaning of the said contract in writing, absolutely refused to consent, or to allow his trustee to consent to said sales, or to any sales of any portion or portions of said estate or land, or to allow the defendant to make or effectuate any sale or sales of any portion or portions thereof whatever.

By means whereof the defendant lost and was deprived of the moneys,

profits, and advantageous, which he would have derived from said sales, and was also compelled to desist from attempting or making any sales of portions of said lands, as it was, by said contract, agreed he might do, and whereby the defendants suffered damages, which with said profits and advantages to which he was entitled, and of which he was deprived as aforesaid, amounts to more than twenty-five thousand dollars, and for which sum the defendant demands judgment against the plaintiff in this action.

192 2. For a further counter-claim in this behalf, as aforesaid the defendant states that at the time of the execution and delivery of the said bond or writing obligatory set forth in said complaint, the plaintiff executed and delivered to the defendant a deed of conveyance of said premises, and the defendant simultaneously at *at* the request of the plaintiff executed and delivered to one Robert Saunders, a trust deed of said premises as collateral security to the said bond or writing obligatory, which trust deed has been, as defendant is informed and believes, burnt and lost, and in which trust deed it was, among other things, provided and contained, that to entitle the said trustee to foreclose the lien on said premises, created thereby for the benefit of said plaintiff, a written notice should be given to the defendant of the proceedings to foreclose said lien, and should be published in a newspaper published in the city of New York for at least sixty days prior to such foreclosure and prior to any sale of the premises under such foreclosure.

193 That no such notice was ever given or published by the said plaintiff, or his said trustee, nor any legal or valid foreclosure of said lien, or sale of said premises thereunder, ever had; yet the said plaintiff, untruly pretending and asserting that there had been a legal and valid foreclosure of said lien, and taking advantage of the disloyal and riotous disposition and practices of himself and neighbors in the vacinity of said premises, unlawfully, and without any authority of law, went on said premises with his agents and abettors, and drove away, and ejected therefrom, the agents and tenants of the defendants, and placed his own agents and tenants thereon, whereby the defendant was for a long time deprived of the enjoyment and possession of said premises, & of the rents thereof, whereby a grist-mill and portions of a dock thereon were burnt and destroyed, and other distruction and damage occasioned, to the damage of the said defendant of at least seventy-five thousand dollars, and for which sum the said defendant hereby demands judgment against the said plaintiff in this action.

194 3. For a further counter-claim in this behalf said defendant states that, after the execution and delivery to him of the aforesaid deed of said premises, and *and* before any default had occurred in respect of the payment of the moneys mentioned in the bond or writing obligatory set forth in said complaint, the said defendant erected, and caused to be put on said premises, valuable improvements, consisting of dwelling-houses, outhouses, a saw-mill, a grist-mill, a dock, and other erections and fixtures, at an expense of over one hundred and fifty thousand dollars, the possession, enjoyment, and benefit of which improvements belonged to the defendant; that thereafter, and at various times, during the years 1861, 1862, 1863, and 1864, the said plaintiff, combining and conspiring with divers other disloyal and rebellion citizens of the State of Virginia, stir'ed up, instigated, and incited an unlawful, an rebellion in the said State of Virginia, and a treasonable insurrection against the laws and Government of the United States, and against the peace and good order of the people of that State and of the United

States; that in such riot, rebellion, and insurrection, the said plaintiff took an active part, became and officer in the military service of the so-called confederacy, and, to the utmost of his skill, cunning, and
195 power, exerted himself to overthrow and destroy the authority of the laws and of the Government of the United States within said State of Virginia, and to destroy the property of the loyal citizens of United States. To effect such treasonable and unlawful designs the said plaintiff, with more than three other persons, united with force and arms to overthrow said Government and to destroy such property; and among the unlawful acts committed by said rioters and conspirators was the destruction, by burning, of the grist-mill aforesaid and the dock or wharf aforesaid belonging to the defendant, and erected and constructed by the defendant on the premises aforesaid, and that the damages occasioned by said unlawful distruction and burning of said grist-mill and wharf, and which the defendant has thereby suffered, amount to at least the sum of seventy-five thousand dollars; for which sum the defendant hereby demands judgment against the said plaintiff in this action.

Second. And for a seperate and further defence to the supposed cause of action alleged in said complaint, said defendant denies that the
196 terms of the contract mentioned in said bond are correctly set forth in the said complaint; and, on the contrary thereof, avers that the whole of the said contract and the terms thereof are herein above copied and set forth; and the defendant here refers to the same as if the same were in this seperate defence repeated.

Said defendant also avers that the said bond or writing obligatory was executed in part fulfilment of said contract, and it was at the same time understood and agreed, by and between the said plaintiff and defendant, that the said contract should continue in full force and effect, and that the plaintiff should keep and perform the covenants and provisions thereof on his part and behalf to be kept and performed; that said plaintiff has not kept and performed the provisions and covenant herein above particularly recited in respect to allowing defendant to sell such portion of the land as he might see fit from time to time, but has failed and refused to keep or perform the said provisions or covenant in the manner in this answer hereinto afore particularly stated, and to which defendant refers as a part of this defence. Wherefore the
197 plaintiff is not entitled to claim or demand the payment of the moneys mentioned on said bond; and the defendant denies that there is due or unpaid, on account of said bond, or the debt mentioned therein, the sum or interest alleged and demanded in said complaint, or any sum whatever.

Wherefore the said defendant demands judgment against said plaintiff for the sum of one hundred thousand dollars, with costs and disbursements of this action.

(S'd) E. L. FANCHER,
Attorney for Defendant.

CITY AND COUNTY OF NEW YORK, *ss:*

James Bigler, the defendant above named, being duly sworn, says that the foregoing answer is true, to his knowledge, except as to the matters therein stated on his information and belief; and, as to those matters, he believes it to be true.

(S'd) J. BIGLER.

Sworn this sixth day of January, 1866, before me.

(S'd) E. FRANCIS HYDE,
Notary Public in & for the City and County of New York.

198 Supreme court, city and county of New York.

WILLIAM WALLER, PLAINTIFF,
against
JAMES BIGLER, DEFENDANT.

The plaintiff replying to the answer of the defendant herein, alleges as follows:

As to the first counter-claim in said answer set forth, plaintiff says he has no knowledge or information sufficient to form a belief as to the allegations in folios 7 and 8 in said answer, in respect to said defendant's alleged agreements or bargains to sell to the persons named in said answer or to any one else, any portion or portions of said estate or lands referred to in the complaint and answer.

And plaintiff denies that said defendant in respect to either of said alleged sales, ever offered to pay, or tendered to this plaintiff, such sum or sums as would have afforded ample security to the plaintiff for the liquidation of the residue of the debt for the purchase of said estate;

and plaintiff denies that he did, in violation of the contract be-
199 tween plaintiff and defendant in respect to said land, refuse to allow said defendant to sell any portion or portions of said land if said defendant would comply with the conditions of said contract.

And plaintiff further says he has no knowledge or information sufficient to form a belief, as to whether by means of any such supposed and alleged refusal on his part the defendant suffered any loss of profits or damages whatever, and plaintiff denies that defendant did suffer any damage or loss of any profits, in respect to the matters set up in the said counter-claim, by reason of any wrong or defaults on the part of this plaintiff, or that said defendant ever incur'ed in said matter in any respect to said supposed losses of profits and said damages damage in the sum of twenty-five thousand dollars, or in any other sum.

As to the second counter-claim set forth in said answer, plaintiff says that when the bond of the defendant set forth in the complaint herein was executed, it was subsequent to the delivery by this plaintiff to said defendant of a deed for the land referred to in said complaint, although

it was on the same date, and at the same interview; and plaint-
200 iff further alleges that the said defendant, at the time of delivering said bond, also delivered to Robert Saunders duly executed deed of trust on said land, to secure the payment of said bond, as alleged in said counter-claim; and plaintiff says that he has not the original nor copy of said deed of trust, but upon information and belief in respect thereto, denies that in said deed of trust it was provided that, to entitle the said trustee to foreclose the lien on said land created on said deed, a written notice should be given to the defendant of the foreclosure proceedings, or that a notice thereof should be published in a newspaper in the city of New York for sixty days prior to any sale under such foreclosure; and plaintiff further replying, denies that there have been any illegal proceedings by *trime* or for his account to his knowledge or belief, under said deed of trust, and he denies all the allegations in said answer herein, beginning at the first of folio 14 in said answer, and to the close of the second counter-claim in said

answer, and he denies that he damaged the defendant, in respect
201 to the matters set out in said counter-claim in the sum of seventy-five thousand dollars, or in any sum.

For a further reply, plaintiff says in respect to the third counter-claim contained in said answer that he admits that said defendant erected various buildings and improvements on said land, but plaintiff

has no knowledge or information sufficient to form a belief in respect to the expense of said buildings and improvements.

And as to the other allegations in said counter-claim, the plaintiff denies each and every one, except that he admits that, during a part of the period referred to, he, said plaintiff, served in the army of the late Confederate States, in the war between them and the United States, and that the plaintiff served as aforesaid to the best of his ability, in accordance with the laws of war. But plaintiff explicitly denies all knowledge privity to, or any personal connection with, or agency in, any of the alleged injuries, distruction, and damage to the personal property of said defendant. And plaintiff further alleges that he has, before the commencement of this action, received from the Gov-
202 ernment of the United States, pardon and amnesty, in accordance *of* law, for his participation in said war, and that he is relieved from all disability at law by reason of anything done in said military service as aforesaid.

Wherefore said plaintiff prays for judgment herein in accordance with his complaint, and that said counter-claims be dismissed, and for his costs.

(S'd) ALGERNON S. SULLIVAN,
Att'y for Plaintiff.

CITY AND COUNTY OF NEW YORK, *ss:*

ALEGERNON S. SULLIVAN, being duly sworn, says that, he is the attorney for the plaintiff in the above-entitled action, that the foregoing reply is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true. That the reason why the verification is not made by the plaintiff is, that the plaintiff does not reside in, nor is he now within, this State, and that the ground of affiant's belief as to the allegations set forth in the foregoing reply are papers pertaining to the subject of this
203 action and written communications received affiant from the plaintiff in respect to the matters and things involved in this action and which papers and written communication are in *deprorent's* possession.

(S'd) ALGERNON S. SULLIVAN.

Sworn to before me this 21st day of March, 1866.

JOHN A. FOLY,
Notary Public.

Notice of trial.

New York supreme court.

WILLIAM WALLER *ag't* JAMES BIGLER.

Please to take notice that the issue of fact in this action will be brought to trial and an inquest taken therein, at the next circuit court, appointed to be held in and for the city and county of New York, at the city hall at the said city, on the first Monday of October next, at ten o'clock in the forenoon of the same day.

Dated the 15th day of September, 1866.

E. L. FANCHER,
Att'y for Def't.

To A. S. SULLIVAN, Esq.,
Attorney for Pl'ff.

204 At a special term of the supreme court of the State of New York, held at the city of New York, on the fourth day of February, 1867—

Present, Hon. E. D. Smith, justice.

WM WALLER
ag't
JAMES BIGLER. } No. 1085.

The above-entitled action being reached on the circuit calendar this day, and the defendant being ready to proceed, but the plaintiff applying for a postponement of the trial, it is, on consent of the respective parties, and on motion of Mr. E. L. Fancher, attorney for the defendant, ordered that the issue of fact in this action, be and they hereby are, referred to Luther R. Marsh, esq., counsellor at law, of the city of New York, as referee, to have and decide the whole issue, and the defendant is at liberty to proceed with the trial before said referee, and examine any of his on one day's notice.

A copy.

WM C. CONNER, *Clerk.*

205 *Notice of reference.*

WILLIAM WALLER
ag't
JAMES BIGLER.

SIR: Please to take notice that the above action will be brought on for trial before Luther R. March, esq., referee appointed by this court to hear and determine the matters in controversy between the parties in the above-entitled action, at the office of said referee, No. 170 Broadway, New York City, on the 25th day of June, inst., at 1 o'clock in the afternoon of the same day.

Dated 10th day of June, 1867.

Yours, &c.,

E. L. FANCHE',
Att'y for Def't.

To A. S. SULLIVAN,
Att'y for Pl'ff.

206 Supreme court.

WILLIAM WALLER
against
JAMES BIGLER.

To the supreme court:

I, Luther R. Marsh, to whom this action was, by order of the court, referred as sole referee, to hear and decide the same, do respectfully report:

That I have been attended on the trial of this action before me, by the parties and their counsel, and have heard the proofs, arguments, and allegations of the respective parties, and having duly considered the same, I do find and report, as matter of fact:

First. That the plaintiff and defendant entered into the written agreement set forth in the answer in this action, on the 2nd day of April, 1853, and that the same was not changed by any subsequent agreement.

Second. That, in pursuance of said agreement, the plaintiff, on the 10th day May, 1853, executed and delivered to the defendant a deed of the premesis referred to in said agreement.

207 Third. That, on delivery of said deed, defendant paid the plaintiff $5,000 in cash, and gave the bond in suit set forth in the complaint for the balance of the purchase-price, viz, $25,000.

Fourth. To secure payment of said bond, the defendant executed and delivered to one Robert Saunders a deed of trust dated 22nd June, 1853, of which the following is a copy, viz:

"This deed, made the 22d day of June, in the year eighteen hundred and fifty-three, between James Bigler, of Newburg, in the State of New York, and Harriet E. Bigler, his wife, of the one part, and Robert Saunders, of Williamsburg, in the State of Virginia, of the other part, witnesseth: That the said James Bigler and Harriet E., his wife, do grant unto said Robert Saunders the following property, to wit: a tract of land in York County, Va., called Rippon Hall, which tract of land is described in a deed dated on the 10th day of May, 1853, from William Waller, of Williamsburg, in Virginia, to the said James Bigler,

208 which deed is recorded in the court of said county of York, and to which deed reference is made for the description.

"In trust to secure the said William Waller the purchase-money remaining due for the said tract of land, which purchase-money so due is twenty-five thousand dollars, according to the contract between the said Bigler and the said Waller, as follows, to wit: two thousand dollars (or more at the option of the purchaser) at the expiration of two years from the tenth day of May, 1853, and annually thereafter one thousand dollars (or more at the option of the purchaser) until the whole twenty-five thousand shall be paid; it being distinctly understood that the whole of the said amount of twenty-five thousand dollars is to be paid within or at the expiration of ten years from the tenth day of May, 1853, so that whatever sum shall remain unpaid on the 10th day of May, 1863, shall then be due and payable to the said Waller by the said Bigler.

"It is understood that the interest, at the rate of six per cent. p'r annum, which may be due at the end of any & every year on

209 the whole principal amount then due shall *shall* be paid at the end of such year, and that otherwise such a defalcation shall be considered to have been made by the said Bigler as shall authorize the said Waller to require the said Saunders to execute this trust according to law. And the said James Bigler doth covenant to and with the said Robert Saunders that he, the said Bigler, will warrant generally the property hereby conveyed to the said Ro. Saunders, his heirs and assigns, forever.

"It is further understood that a failure on the part of the said Bigler to pay the sum of two thousand dollars on the 10th day of May, 1855, or a like failure to pay at least one thousand dollars annually thereafter, with interest as aforesaid, shall be considered a defalcation on the part of the said Bigler at any one of the periods referred to, as shall a failure to pay the amount remaining due on the 10th day of May, 1863, with interest; and that any such defalcation occur'ing at any one of the periods mentioned shall be sufficient to authorize the said Waller to require the said Saunders to execute this trust according to law.

210 "Witness the following signatures and seals:

"It is understood and this addition was made before the

execution of this deed, that in case of a sale the trustee shall give sixty days notice in newspapers in Richmond and in the city of New York.

"J. BIGLER. [SEAL.]
"HARRIETT E. BIGLER. [SEAL.]
"ROB'T SAUNDERS, *Trustee.*" [SEAL.]

Fifth. That, up to and including the 10th day of May, 1860, the defendant had paid the plaintiff on account of said bond the sum of twelve thousand dollars and interest.

Sixth. That, on the 10th day of May, 1861, there remained unpaid on the said bond the further sum of $1,000, payable by the terms thereof and of said deed of trust which the defendant failed to pay, and that the whole amount of said bond by such failure according to its terms and said deed of trust thereupon became payable, viz., the sum of $13,000.

211 Seventh. That the defendant entered into the possession of said premises under said deed and agreement, and expended large sums of money in making and erecting improvements thereon, and erecting buildings thereon amounting in the whole to at least the sum of $100,000

Eighth. That the defendant had offers from several parties who desired to make purchases of part of said premesis and who offered to pay the defendant $300 per acre for such portions as should be purchased by them and released from the lien of said deed of trust.

Ninth. That said defendant applied to the plaintiff to release such portions from the lien of said trust deed, which said plaintiff refused to do.

Tenth. That said defendant would have realized from such sales had he been permitted to make the same the sum of 3,000$ and that he offered to pay the whole of the proceeds of such sales to the plaintiff to be applied on said bond, and that the balance of said premesis would have afforded ample security for the liquidation of the residue of the debt due.

212 Eleventh. That said plaintiff afterwards caused a pretended sale at public auction of said premesis to be made under said trust deed, by said Rob't Saunders, on the 1st day of April, 1862, and that at said sale said plaintiff bid in and became the nominal purchaser of said premises at and for the price of $17,000 bidden by him therefore, and that for the balance of said purchase-money over the am't due on said bond, said plaintiff gave his note to said trustee and that said Saunders as such trustee thereupon executed and delivered to said plaintiff a deed purporting to convey said premesis to him in pursuance of said sale and the terms of said deed of trust which was accepted by him.

Twelfth. No notice of such sale was ever published in any of the papers published in the city of New York as required by said deed of trust.

Thirtee'th. That said sale was made on said premesis and that said plaintiff attended said sale on said premesis and bid for the same as aforesaid at said sale.

213 Fourteenth. That, after such pretended sale, said plaintiff always claimed and insisted that he was the owner of said premesis, and that he had derived title thereto by said sale and deed from said trustee to him, and claimed title thereto in opposition to the defendant, and notified the defendant that he had purchased said land and

should contest his claim thereto; and that said plaintiff received the sum of $2,000 in confederate money, from the rebel or confederate authorities, for the use and occupation of said premesis by them; and that said plaintiff disposed of part of the personal property on said premesis and exercised various acts of ownership over said premesis and offered the same for sale and endeavored to sell the same. And said defendant was deprived of and unable to obtain possesssion of said premesis until May, 1865.

Fifteenth. That, after such sale and while said premesis were constructively in the possession of said plaintiff, the greater part of the buildings and improvements erected thereon by the defendant
214 were burned and destroyed by the rebel military authorities, and property to the value of at least $75,000 was destroyed thereby.

Sixteenth. That, at the time of said sale, the annual value of said premesis and improvement, amounted to the sum of $5,000.

And, as conclusions of law from the facts aforesaid, I do find and report:

First. That said plaintiff violated the terms of said agreement to be performed on his part, in that he refused to release such portions of said premesis as said defendant desired to sell as aforesaid, and that said defendant sustained loss and damages by said refusal to the amount of three thousand dollars, with interest thereon, at the rate of six p'r cent. per annum, from the spring of the year 1854; which sum said defendant is entitled to counter-claim against the claim of the plaintiff in the action.

Second. That said sale, by said trustee, not being advertised in the manner required by said trust deed was irregular and void, and
215 conferred no title upon said plaintiff.

Third. That, between the time of said sale, by said trustee, viz., April 1st, 1862, and the month of May, 1865, said premesis were and continued constructively and in law in the possession of the plaintiff.

Fourth. That said plaintiff is therefore liable to the defendant and is bound to account to him for the rental value of said premesis during the period of said plaintiff's possession thereof as aforesaid, at the rate and value of the same when he first took such possession, viz., at the rate of $5,000 per year.

Fifth. That such rental value, during such possession by the plaintiff, amounting to the sum of $15,000 for three years is a valid and existing claim in favor of the defendant against the plaintiff and said defendant is entitled to counter-claim and of'set the same against the claim of the plaintiff in this action.

Sixth. That said claims in favor of the defendant against the
216 plaintiff, amounting together to more than the claim of the plaintiff, he is not entitled to recover anything in this action.

Seventh. That on the merits judgment should be rendered in this action in favor of the defendant, against the plaintiff, dismissing the complaint with costs.

All of which is respectfully submitted.

Dated, New York, September 28th, 1867.

(Signed) LUTHER R. MARSH,
Referee.

217 At a special term of the supreme court of the State of New York, held at the city of New York, on the fifteenth day of October, 1867—

Present, Hon. Josiah Sutherland, justice.

W'M WALLER
vs.
JAMES BIGLER.

On the pleadings and proceedings in this action, and on the report of the referee herein, and on reading the certificate of said referee, and on proof of due service of notice of this motion:

On motion of E. L. Fancher, esq., att'y for the defendant in this, A. S. Sullivan, esq., att'y for the plaintiff herein, being heard in opposition thereto, it is ordered that an extra allowance of five hundred dollars be granted unto the defendant herein in ad'ition to his taxable costs in said action.

A copy.

W'M C. CONNER, *Clerk.*

218 N. Y. supreme court.

WILLIAM WALLER
vs.
JAMES BIGLER.
Judgment. Octo., 1867.

The issues of fact in this action having been, by an order of the court, refer'ed to Luther R. Marsh, esq., counsellor at law, of the city of New York, as sole referee to hear and decide the whole issue, and the same having been tried before said referee, who, on the 28th day of September, 1867, made his report, whereby he decides that the complaint of the plaintiff in this action be dismissed with costs, and that judgment should be rendered in favor of the defendant against the plaintiff for his costs of this action; and such costs having been adjusted on notice (excluding $500 additional allowance granted by the court) at the sum of $10,044 77.

Now, on motion of E. L. Fancher, att'y for the defendant, it is adjudged that the complaint of the plaintiff in this action be, and the same is, dismissed, with costs, and that James Bigler, the de-
219 fendant, recover of William Waller, the plaintiff, the aforesaid costs, disburs'ments, and allowances, amounting in the whole to the sum of one thousand and four dollars and seventy-seven cents, ($1,004 77,) and that the defendant have execution therefor.

(Indorsed:) Filed October 17th, 1867, at 10 h. 38 m.

All which we have caused by these presents to be exemplified, and the seal of our said supreme court to be hereunto affixed.

Witness Josh. Sutherland, justice, at the city of New York, the 17th day of October, in the year of our Lord one thousand eight hundred and sixty-seven, and of our independence the ninety-second.

W'M C. CONNER, *Clerk.*

I, Josh. Sutherland, presiding justice of the supreme court of the State *of the State* of New York, for the city and county of New York, do hereby certify that William C. Conner, whose name is subscribed to the preceding exemplification is the clerk of the said county of
220 New York, and clerk of the said supreme court for the said county, duly elected and sworn, and that full faith and credit

are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said supreme court, and that the attestation thereof is in due form.

Dated October 17th, 1867.

JOSH. SOUTHERLAND,
Justice.

STATE OF NEW YORK,
City & County of New York, ss:

I, William C. Conner, clerk of the supreme court of said State, in and for the city and county of New York, do hereby certify that Josh. Southerland, whose name is subscribed to the preceeding certificate is presiding justice of the supreme court of the said State in and for the city and county of New York, duly elected and sworn, and that the signature of said justice to said certificate is genuine.

In testimony whereof I have hereto set my hand and affixed the seal of said court this 17th day of Oct., 1867.

[NEW YORK SEAL.] W'M C. CONNER, *Clerk.*

221 *Record of suit in N. Y. supreme court.*

New York supreme court, city & county of New York.

WILLIAM WALLER
vs.
JAMES BIGLER.

I certify that the above-entitled cause is on the June calendar of this court, as undisposed of.

New York, 2d June, 1868.

D. W. CLARKE,
Clerk Gen'l Term.

STATE OF NEW YORK,
City and County of New York, ss:

I, Charles E. Loew, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, being a court of record, do hereby certify that Daniel W. Clarke, by whom the annexed certificate was made, was, at the time of making the same, clerk of the general term supreme court.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county, the 3rd day of June, 1868.

CHA'S E. LOEW, *Clerk.*

[Int. rev., 5 cents, cancelled.]

222 New York supreme court, city & county of New York.

WILLIAM WALLER
vs.
JAMES BIGLER.

GENTLEMEN: You will please take notice that the plaintiff, William Waller, appeals to the general term of this court from the judgment entered in the above-entitled action on the 17th day of October, 1867,

in favor of the defendant for the sum of $1,004 77, costs upon the report of the referee therein.

Dated New York, November 4th, 1867.

Yours, &c.,

ALGERNON S. SULLIVAN,
Pl'ff's Att'y, 29 Wall St., N. Y.

To E. L. FANCHER,
Defendant's Attorney.
W'M C. CONNER,
Clerk of the City & County of New York.

(Endorsed:) Filed November 5, 1867.

223 (Indorsed:) New York supreme court, city & county of New York. William Waller vs. James Bigler. Notice of appeal. A. S. Sullivan, att'y for pl'ff & appellant, 29 Wall st., N. Y.

224 *Undertaking on appeal from a judgment directing the payment of money.*

New York supreme court, city & county of New York.

WILLIAM WALLER, APPELLANT,
against
JAMES BIGLER, RESPONDENT.

Whereas, on the 17th day of October, 1867, in the supreme court of the State of New York for the city and county of New York, the above-named respondent recovered a judgment against William Waller, the above-named appellant, for $1,004 $\frac{97}{100}$ dollars costs. And the above-named appellant, feeling aggrieved thereby, intends to appeal therefrom to the general term of said court.

Now, therefore, we, William B. Aitken, of No. 112 West 44th street, in the city of New York, and Jeremiah B. Aitken, of No. , 155th street, in said city, do hereby, pursuant to the statute in such case made and provided, undertake that the said appellant will pay all costs and damages which may be awarded against him on said appeal, not exceeding five hundred dollars, and do also undertake that, if the said judgment so appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the said appellant will pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages and costs which shall be awarded against said appellant on the said appeal.

Dated New York, November 4th, 1867.

W'M B. AITKEN.
JEREMIAH B. AITKEN.

225 CITY & COUNTY OF NEW YORK, *ss:*

William B. Aitken, one of the subscribers to the foregoing undertaking, being duly sworn, says that he is a resident and a householder within this State, and is worth the sum of two thousand dollars, over all his debts and liabilities, and exclusive of property exempt by law from execution.

WILLIAM B. AITKEN.

Sworn to before me this 4th day of November, 1867.

JOHN F. CORNELL,
Com'r of Deeds.

CITY & COUNTY OF NEW YORK, *ss :*

Jeremiah B. Aitken, one of the subscribers to the foregoing undertaking, being duly sworn, says that he is a resident and householder within this State, and is worth the sum of two thousand dollars, over all his debts and liabilities, and exclusive of property exempt by law from execution.

JEREMIAH B. AITKEN.

Sworn to before me 4th day of November, 1867.

JOHN F. CORNELL,
Com'r of Deeds.

CITY & COUNTY OF NEW YORK, *ss :*

I certify that, on this 4th day of November, 1867, before me personally appeared the above-named William B. Aitken and Jeremiah B. Aitken, known to me to be the individuals described in, and who executed the above undertaking, and severally acknowledged that they executed the same.

JOHN F. CORNELL,
Com'r of Deeds.

("Endorsed:) Filed November 5, 1867."

(Indorsed:) New York supreme court, city & county of New York. William Waller, plaintiff & appellant, ag't James Bigler, defendant & respondent. Undertaking on appeal from judgment, and stay of proceedings. Algernon S. Sullivan, att'y for appellant, 29 Wall st., N. Y.

226 STATE OF NEW YORK,
City & County of New York, ss :

I, Charles E. Loew, clerk of the said city and county, and clerk of the supreme court of said State for said county, do certify that I have compared the preceding with the original notice of appeal & undertaking on appeal the matter of Waller ag'st Bigler, on file in my office, and that the same is a correct transcript therefrom, and of the whole of such original.

In witness whereof I have hereunto subscribed my name and affixed my official seal, this 1st day of June, 1868.

CHA'S E. LOEW, *Clerk.*

(Indorsed:) Filed June 8, 1868. W'm H. Barry, clerk.

227 The people of the State of New York, by the grace of God free and independent, to all whom these presents shall come or may concern, greeting:

Know ye that we, having examined the records and files in the office of the clerk of the county of New York, and the clerk of the supreme court of said State for said county, do find a certain order there remaining, in the words and figures following, to wit:

Supreme court, State of New York.

WILLIAM WALLER, APPELLANT,
vs.
JAMES BIGLER, RESP'D'T.

At a general term of the supreme court, held at the city hall, in the city and county of New York, on the 16th day of December, 1868—

Present, Justices Daniels, Peckham and Mullen—

The appeal from the judgment entered in this action on the seventeenth day of October, A. D. 1867, for one thousand and four dollars and seventy-seven cents, having been heard at the general term, and after hearing Algernon S. Sullivan, attorney for the appellant, and
228 J. K. Hayward, counsel for the respondent, it is now ordered and adjudged that the said judgment be reversed; that a new trial be had herein; that the order of reference made herein be vacated, and the costs herein to abide the event of this action.

A copy.

CHA'S E. LOEW, *Clerk.*

(Endorsed:)

We hereby consent to the entry of the within judgment and order.

E. L. FANCHER,
Att'y for Respondent.
ALGERNON S. SULLIVAN,
Att'y for Appellant.

All which we have caused by these presents to be exemplified, and the seal of our said supreme court to be hereunto affixed.

Witness, Albert Cardozo, justice at the city of New York, the 13th day of April, in the year of our Lord one thousand eight hundred and sixty-nine, of our independence the ninety-third.

CHA'S E. LOEW, *Clerk.*

229 I, Albert Cardozo, presiding justice of the supreme court of the State of New York, do hereby certify that Charles E. Loew, whose name is subscribed to the preceeding exemplification, is the clerk of the said county of New York, and clerk of said supreme court for said county, duly elected and sworn, and that full faith and credit are due to his official acts. I further certify, that the said seal affixed to the exemplification is the seal of our said supreme court, and that the attestation thereof is in due form.

Dated New York, April 13th, 1869.

ALBERT CARDOZO,
Justice Supreme Court, Presiding.

STATE OF NEW YORK,
City and County of New York, ss:

I, Charles E. Loew, clerk of the supreme court of said State, in and for the city & county of New York, do hereby certify that Albert Cardozo, whose name is subscribed to the preceeding certificate, is presiding justice of the supreme court of said State, in and for the city and county of New York, duly elected and sworn, and that the signature of said justice to said certificate is genuine.

In testimony whereof I have hereto set my hand and *and* affixed the seal of said court, this 13th Ap'l, 1869.

[NEW YORK SEAL.] CHA'S E. LOEW, *Clerk.*

230 And at another day, to wit, Saturday May 7th, 1870, the defendants. by their counsel, this day exhibited to the court a duly authenticated certificate of qualification of W'm G. Waller, as administrator on the estate of the defendant, W'm Waller, now dec'd. Whereupon, on motion of the said W'm G. Waller, by his counsel, it is ordered by the court, that the same be filed, and that this cause hereafter proceed in the name of said William G. Waller, as such administrator.

231 *Certificate of W'm G. Waller's qualif'n as adm'or.*

STATE OF VIRGINIA,
City of Lynchburg, to wit:

Whereas, at a monthly term of the corporation court of the city of Lynchburg, in the State of Virginia, begun and held at the court-house, in said city, on Monday, the second day of May, one thousand eight hundred and seventy, Jane M. Waller, widow and relict of William Waller, deceased, by note in writing, declined to take upon herself the burthen of the administration of the estate of the said William Waller: On the motion of William G. Waller, who made oath and entered into and acknowledged a bond in the penalty of two hundred dollars ($200 00) with Peter J. Otsy as his security, (who justified as to his sufficiency,) and the court deemed him sufficient, a certificate is granted the said William G. Waller for obtaining letters of administration upon the estate of the said William Waller, dec'd, in due form:

And whereas, by the 11th section of chapter 130 of the code of Virginia, edition of 1860, it is, among other things, provided that the clerk of the court, by which an order of administration is made, shall, when required by any personal representative, make out letters of administration in due form, the same, when so made out, should be signed by the clerk, sealed with the seal of the court, and attested by the judge thereof:

232 Therefore I, William D. Dowe, clerk of said court, in pursuance of the law above recited, do issue these letters of administration, and do hereby authorise and empower the said William G. Waller well and truly to administer all and singular the goods, chattels, and credits of the said William Waller, deceased, in all matters and things concerning the same, according to law, hereby requiring the said William G. Waller to make and exhibit into the said court a true and perfect inventory of the said goods and chattels and credits, and also to make a just and true account of his actings and doings therein when thereto lawfully required.

Given under my hand, as clerk, and the seal of said court this third day of May, A. D. 1870.

W'M D. DOWE, *Clerk.*

233 VIRGINIA,
City of Lynchburg, to wit:

I, James Garland, only judge of the corporation court of the city aforesaid, in the State of Virginia, do certify that William D. Dowe, who hath given the preceding letters of administration, is clerk of the said court, and this his said attestation is in due form.

Given under my hand this 5th day of May, 1870.

JAMES GARLAND.

(Indorsed:) Bigler vs. Waller, &c. Filed May 7, 1870. W. H. Barry, clerk.

234 *Discontinuance of suit in New York courts.*

{ NEW YORK SEAL. } The people of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or may concern, greeting:

Know ye that we, having examined the records and files in the office of the clerk of the county of New York, and clerk of the supreme court of said State for said county, do find a certain consent & order of discontinuance there remaining, in the words and figures following, to wit:

235 New York supreme court, city and county of New York.

WILLIAM WALLER *against* JAMES BIGLER.

We hereby consent that the above-entitled action be discontinued, without costs to either party, and that an order to that effect be entered hereon with the clerk of this court.

Dated New York, November 25th, 1869.

E. L. FANCHER,
Def't's Att'y.
ALGERNON S. SULLIVAN,
Pl'ff's Att'y.

New York supreme court.

WILLIAM WALLER *against* JAMES BIGLER.

On reading and filing the foregoing consent, ordered that this action be, and the same hereby is, discontinued, without costs to either party.

(Endorsed:) Filed Nov. 26, 1869.

236 (Endorsed:) New York supreme court. William Waller against James Bigler. Exemplified copy. Consent and order of discontinuance. A. S. Sullivan, pl'ff's att'y, 29 Wall st., N. Y.

237 All which we have caused by these presents to be exemplified, and the seal of our said supreme court to be hereunto affixed.

Witness D. P. Ingraham, justice, at the city of New York, the twenty-seventh day of November, in the year of our Lord one thousand eight hundred and sixty-nine, and of our independence the ninety-fourth.

CHA'S E. LOEW, *Clerk.*

I, D. P. Ingraham, presiding justice of the supreme court of the State of New York for the city and county of New York, do hereby certify that Charles E. Loew, whose name is subscribed to the preceding exemplification, is the clerk of the said county of New York, and clerk of said supreme court for said county, duly elected and sworn, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said supreme court, and that the attestation thereof is in due form.

Dated New York, November 27, 1869.

D. P. INGRAHAM, *Justice.*

STATE OF NEW YORK,
City & County of New York, ss:

I, Charles E. Loew, clerk of the supreme court of said [illegible] for the city and county of New York, do hereby certify that [illegible] graham, whose name is subscribed to the preceding certificate, is presiding justice of the supreme court of said State in and for the city and county of New York, duly elected and sworn, and that the sig-
238 nature of said justice to said certificate is genuine.

In testimony whereof I have hereto set my hand and affixed the seal of said court this 27 day of Nov., 1869.

[NEW YORK SEAL.] CHA'S E. LOEW, *Clerk.*

[Rev., 5 cents stamp, cancelled.]

(Indorsed:) W'm Waller vs. Ja's Bigler. Order of discontinuance. Supreme court New York. 1870, May 5th. Filed. W. H. Barry, clerk.

239 And now, at this day, to wit, June 3d, A. D. 1870, being the same day and year first herein mentioned, the death of the defendant Robert Saunders having been heretofore suggested, and a scire facias to revive this cause having been returned executed on the 21st day of March, 1869, on M. R. Harrell, his committee, administrator; and the death of the defendant, William Waller, having been suggested, and William G. Waller, who has taken letters of administration on his estate, having moved the court to be allowed to appear and defend this suit, the court doth order that the same proceed against the said M. R. Harrell, administrator of Robert Saunders, dec'd, and the said William G. Waller, administrator of William Waller, dec'd; whereupon this cause came on to be further heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, the court sustaining the exceptions of the defendant Waller to the report of Commissioner Chahoon, except so far as the said report is in conformity with the findings of the court hereinafter stated. And the court proceeding to ascertain, so far as necessary to the determination of this controversy, the equities of the several parties to this suit, do find that upon the contract between the plaintiff, Bigler, and the defendant, Waller, now deceased, made on the 2nd of April, 1853, there was due from Bigler to Waller, on the 10th of May, 1860, on account of purchase-money for the tract of land mentioned in said contract, the sum
240 of thirteen thousand dollars; that upon this sum Waller was entitled to interest at the rate of six per centum per annum, from the said 10th of May, 1860, to this date, namely, May 10th, 1870, except from the 19th of April, 1861, to the 26th of May, 1865, when civil war existed between the United States and the States and parts of States in insurrection; that Bigler is entitled to a credit for $2,000 in confederate notes, received by Waller in October, 1863, and then worth at the rate of thirteen for one—one hundred and fifty-three $\frac{84}{100}$ dollars in United States coin, with interest to this date; that Bigler is not entitled to compensation for damages alleged to have resulted from failure of Waller to make releases of portions of the estate sold by him, nor for other acts or omissions charged in his bill.

And thereupon the court doth adjudge, order, and decree that James Bigler, the plaintiff, pay to said William G. Waller, administrator of William Waller, dec'd, the sum of seventeen thousand three hundred & seventy-seven $\frac{44}{100}$ dollars in United States coin, and to the several defendants their costs by them about their suit in this behalf expended.

234 *Discontinuance of suit in New York courts.*

{ NEW YORK SEAL. } The people of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or may concern, greeting:

Know ye that we, having examined the records and files in the office of the clerk of the county of New York, and clerk of the supreme court of said State for said county, do find a certain consent & order of discontinuance there remaining, in the words and figures following, to wit:

235 New York supreme court, city and county of New York.

WILLIAM WALLER *against* JAMES BIGLER.

We hereby consent that the above-entitled action be discontinued, without costs to either party, and that an order to that effect be entered hereon with the clerk of this court.

Dated New York, November 25th, 1869.

E. L. FANCHER,
Def't's Att'y.
ALGERNON S. SULLIVAN,
Pl'ff's Att'y.

New York supreme court.

WILLIAM WALLER *against* JAMES BIGLER.

On reading and filing the foregoing consent, ordered that this action be, and the same hereby is, discontinued, without costs to either party.

(Endorsed:) Filed Nov. 26, 1869.

236 (Endorsed:) New York supreme court. William Waller against James Bigler. Exemplified copy. Consent and order of discontinuance. A. S. Sullivan, pl'ff's att'y, 29 Wall st., N. Y.

237 All which we have caused by these presents to be exemplified, and the seal of our said supreme court to be hereunto affixed.

Witness D. P. Ingraham, justice, at the city of New York, the twenty-seventh day of November, in the year of our Lord one thousand eight hundred and sixty-nine, and of our independence the ninety-fourth.

CHA'S E. LOEW, *Clerk.*

I, D. P. Ingraham, presiding justice of the supreme court of the State of New York for the city and county of New York, do hereby certify that Charles E. Loew, whose name is subscribed to the preceding exemplification, is the clerk of the said county of New York, and clerk of said supreme court for said county, duly elected and sworn, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said supreme court, and that the attestation thereof is in due form.

Dated New York, November 27, 1869.

D. P. INGRAHAM, *Justice.*

STATE OF NEW YORK,
City & County of New York, ss:

I, Charles E. Loew, clerk of the supreme court of said State in and for the city and county of New York, do hereby certify that D. P. Ingraham, whose name is subscribed to the preceding certificate, is presiding justice of the supreme court of said State in and for the city and county of New York, duly elected and sworn, and that the sig-
238 nature of said justice to said certificate is genuine.

In testimony whereof I have hereto set my hand and affixed the seal of said court this 27 day of Nov., 1869.

[NEW YORK SEAL.] CHA'S E. LOEW, *Clerk.*

[Rev., 5 cents stamp, cancelled.]

(Indorsed:) W'm Waller vs. Ja's Bigler. Order of discontinuance. Supreme court New York. 1870, May 5th. Filed. W. H. Barry, clerk.

239 And now, at this day, to wit, June 3d, A. D. 1870, being the same day and year first herein mentioned, the death of the defendant Robert Saunders having been heretofore suggested, and a scire facias to revive this cause having been returned executed on the 21st day of March, 1869, on M. R. Harrell, his committee, administrator; and the death of the defendant, William Waller, having been suggested, and William G. Waller, who has taken letters of administration on his estate, having moved the court to be allowed to appear and defend this suit, the court doth order that the same proceed against the said M. R. Harrell, administrator of Robert Saunders, dec'd, and the said William G. Waller, administrator of William Waller, dec'd; whereupon this cause came on to be further heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, the court sustaining the exceptions of the defendant Waller to the report of Commissioner Chahoon, except so far as the said report is in conformity with the findings of the court hereinafter stated. And the court proceeding to ascertain, so far as necessary to the determination of this controversy, the equities of the several parties to this suit, do find that upon the contract between the plaintiff, Bigler, and the defendant, Waller, now deceased, made on the 2nd of April, 1853, there was due from Bigler to Waller, on the 10th of May, 1860, on account of purchase-money for the tract of land mentioned in said contract, the sum
240 of thirteen thousand dollars; that upon this sum Waller was entitled to interest at the rate of six per centum per annum, from the said 10th of May, 1860, to this date, namely, May 10th, 1870, except from the 19th of April, 1861, to the 26th of May, 1865, when civil war existed between the United States and the States and parts of States in insurrection; that Bigler is entitled to a credit for $2,000 in confederate notes, received by Waller in October, 1863, and then worth at the rate of thirteen for one—one hundred and fifty-three $\frac{54}{100}$ dollars in United States coin, with interest to this date; that Bigler is not entitled to compensation for damages alleged to have resulted from failure of Waller to make releases of portions of the estate sold by him, nor for other acts or omissions charged in his bill.

And thereupon the court doth adjudge, order, and decree that James Bigler, the plaintiff, pay to said William G. Waller, administrator of William Waller, dec'd, the sum of seventeen thousand three hundred & seventy-seven $\frac{46}{100}$ dollars in United States coin, and to the several defendants their costs by them about their suit in this behalf expended.

And the court doth further adjudge, order, and decree that the injunction heretofore granted the said James Bigler be dissolved, and that Henry Coalter Cabell, of the city of Richmond, & State of Virginia, be substituted in the place and stead of Robert Saunders, dec'd, as trustee in the deed of trust executed by James Bigler, on the 22nd day of June, 1853, for the benefit of the said William Waller, with all the rights, powers, duties, and responsibilities of the trustee named in the said deed.

241

And it is further adjudged, ordered, and decred that the said Henry Coalter Cabell do proceed to sell so much of the land embraced in the said deed of trust as has not been by the said James Bigler, with the consent of the said William Waller, dec'd, heretofore sold, after giving 60 days' notice in one or more newspapers published in the city of Richmond, Virginia, and the city of New York, of the time and place of sale, to be fixed in his discretion, unless before the expiration of the said sixty days the said sum of seventeen thousand three hundred & seventy-seven $\frac{48}{100}$ dollars in United States coin shall have been paid to the said William G. Waller, administrator of William Waller, dec'd, by the said James Bigler, or some one for him, the purchase-money to be payable in United States coin, one-third of it at the time of the sale, and the balance in three equal instalments, on credits respectively of six, twelve, and eighteen months.

But before proceeding to execute this trust, the said trustee, Henry Coalter Cabell, shall, before the clerk of this court, enter into bond with good security, in the penalty of ($) twenty-five thousand dollars, conditioned faithfully to disburse and account for the money he may *re*quire as such trustee.

242

(Indorsed:) Bigler vs. Waller & others. Note of decree.

CL'K'S OFFICE, U. S. CIR. CO.,
Richmond, May 28th, 1870.

The enclosed decree was forwarded to this office (with opinion accompanying) from Chief Justice Chase, with direction to submit the same to the district judge, in order that it may be entered of record.

W'M H. BARRY, *Clerk.*

Ent.
Filed June 3rd, 1870, & ent'r'd.

W. H. BARRY, *Clk.*

243 *Opinion of Chief Justice Chase.*

Circuit court of the United States, the fourth circuit and district of Virginia.

JAMES BIGLER
v.
WILLIAM WALLER AND OTHERS.

The general principles on which this case must be adjudicated were announced at the last term. But a suit commenced by the defendant Waller, in a State court of New York, against the plaintiff, Bigler, prior to the bringing of the present suit in this court, was then pending and undetermined, and we did not think proper, until that suit shall be disposed of, to proceed to final decree here. That suit, however, has been

terminated by discontinuance, and there is no reason why a final disposition of the litigation should not now be made.

The principles stated at the last term require that all the exceptions taken to the report of Commissioner Chahoon be sustained, except so far as the views now to be stated may affect this general order.

It is not denied that, on the tenth day of May, 1860, the sum of $13,000 was due from the plaintiff, Bigler, to the defendant Waller, as a balance of the purchase-money agreed to be paid for the estate sold to the former by the latter.

The questions to be considered are these:

1. By what rule shall interest be computed on this balance; in other words, shall interest be allowed for the period during which in-
244 tercourse between the parties, and between the parts of the country in which they respectively lived, was suspended by the civil war?

In a case decided by the circuit court of the United States for the district of North Carolina, it was held that interest did not cease during the recent civil war in consequence of the residence of the parties to the contract in the hostile sections of the country. Since that decision was made, it has been held by the Supreme Court of the United States, in the case of Hauger v. Abbott, 6 Wall, 532, that the statute of limitations was suspended in the insurgent States, as to non-residents having causes of action against residents, by the civil war. And in the case of Ward v. Smith, 7 Wall, 452, while it was held that, under the circumstances of that particular case, interest did not cease, the opinion of the court was put upon circumstances creating an exception to the general rule that interest does not accrue during war between citizens or subjects of belligerent States. The general rule was neither affirmed or denied, but it may, not unreasonably, be inferred from the language of the court, that if the direct question presented by this case were before that tribunal, it would be resolved in favor of the maker of the bond. Bigler, the maker, was in occupation of the estate purchased at the commencement of the war by his agent; and not only was he wholly excluded from occupancy and from possession during its contin-
245 uance, but the improvements put on the property by him at great cost, were destroyed, and the estate otherwise was greatly injured. Waller, the obligee, was in the confederate army, and at a sale made under the trust, and executed by Bigler, to secure the bond, became himself the purchaser, and he was, doubtless, though since the war he has disclaimed title to the land as against Bigler, entitled as such purchaser to the possession.

We have already said that Waller is not to be held responsible for the injuries sustained by Bigler in consequence of the war; but, on the other hand, we cannot doubt that, if interest on a debt should cease in any case, it should cease in this. And our duty is to determine the question as we believe it would be determined by the Supreme Court, if submitted to its consideration.

It is more difficult to determine the period during which interest should cease. The actual beginning of war against the United States doubtless preceded the proclamation of the President of the 15th of April, 1861, calling out the militia to suppress insurrection; but the proclamation declaring the blockade of the ports of the insurgent States must be regarded as the first formal recognition of the existence of civil war by the National Government. That proclamation was issued
246 on the 19th of April; and that date, therefore, must be taken as the date of the commencement of the war. The period of its termination has not been so definitely ascertained.

It was declared, by the concurrent action of the President and of Congress, to have ended on the 2nd of August, 1866, and this date has been recognized by the Supreme Court as the end of the rebellion intended by the abandoned and captured property act and some other legislative provisions. In another case depending on the effect of the statute of limitation, the court thought fit to decline fixing any precise date of termination applicable to all cases. This question being thus left open, we think it right, in this case, to take the establishment at Richmond of the adhering government of Virginia as the recognized government of the whole State as the end of the war in this State. This event may be said to have taken place when the executive department of that government was removed from Alexandria to Richmond, on the 26th of May, 1865. The period, then, to be excluded in the computation of interest, is the time from the 19th of April, 1861, to the 26th of May, 1865.

2. What credit, if any, is to be given to Bigler for money received by Waller from the confederate government?

247 The evidence shows that the sum of two thousand dollars was thus received in October, 1863, by way of compensation for use made of the property, and of indemnity for waste committed upon it. At that time, it appears that the rate of confederate notes for gold was thirteen for one. For this sum of $2,000, reduced to the specie equivalent, with interest on the sum thus ascertained, credit is to be given on the bond.

3. What credit, if any, should be given to Bigler for damage sustained by reason of non-fulfil'ment, on part of Waller, of his contract to release to purchasers?

It is clear enough, upon the evidence, that, under the original contract of purchase, Bigler had a right to sell portions of the estate, and to have these portions released to the purchaser on payment to Waller of so much of the purchase-money as would leave his security unimpaired. And it is sufficiently proved that, some time after the purchase in 1853 or 1854, Bigler had some offers to buy small parcels of the tract, and applied orally to Waller for a release, and that Waller, for some reason, refused. But it does not appear that Bigler, at that time or at any time afterwards until this controversy arose, set up any claim for damages. On the contrary, Bigler continued to make payments on account of the purchase until May, 1860. Under these circumstances, it would be difficult to sustain the claim for damages, were the proof
248 of the quantity of land sold, the price offered, and the demand for release under the contract much clearer and more specific than it is. But on all these points the evidence is vague and indefinite; much too vague and indefinite to form the basis of a decree. We are obliged, therefore, to deny any credit on account of damages. A decree may be entered in conformity with these principles.

249 *Petition for appeal to U. S. Supreme Court.*

Circuit of the United States for the district of Virginia, in the 4th circuit, in equity.

JAMES BIGLER, APPELLANT,
vs.
WILLIAM WALLER AND ROBERT SAUNDERS, respondent'.

To the honorable the Supreme Court of the United States:

The appeal of James Bigler, the above-named appellant, respectfully

showeth: That, on the day of June, 1866, the said appellant filed his bill of complaint in the circuit court of the United States for the district of Virginia, in the 4th circuit, against the above-named William Waller and Robert Saunders, in a suit in equity, to enjoin and restrain the said William Waller and Robert Saunders from proceeding to sell the estate called Ripon Hall, lying on York River, ("Bigler's,") in Virginia, and described in said bill, and for an accounting by the said Waller to the said Bigler for the profits derived from, and the damages done to, said estate belonging to said Bigler while in possession of said Waller; and that a subpœna, issued out of *of* said circuit court,
250 was served on said Waller and Saunders on the day of June, 1866; that the said defendants respectively filed their answer to said bill of complaint, and the complainant replied thereto, wherefore such proceedings were had in the said cause that, on the day of June, 1870, a final decree was entered in said circuit court, wherein it was in substance adjudged that the said Bigler pay the said Waller the sum of $17,100, together with the costs of said actions; which said decree is, *or* this appellant is advised, erroneous, and ought to be reversed.

Wherefore this appellant appeals from the whole of said decree of said circuit court to the Supreme Court of the United States, and respectfully prays that the said decree of the said circuit court, and the bill of complaint, answer, replication, deposition, evidence, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the cause, and that the said decree of the circuit court, and every part thereof, may be *reserved*, or such other decree made as to the said Supreme Court shall seem just.

Noted New York, June 7th, 1870.

JAMES BIGLER,
Appellant.

J. K. HAYWOOD,
Soli. for App'l't.

251 (Indorsed:) U. S. circuit court, fou'th circuit, dist. of Virginia. James Bigler, appellant, vs. William Waller et al., respondents. Appeal to the Supreme Court. J. K. Haywood, sol. for appellant.

252 *Allowance of appeal.*

Circuit court United States, 4th circuit and district of Virginia, in equity.

JAMES BIGLER
vs.
WILLIAM WALLER AND ROBERT SAUNDERS. } Decree June 7, 1870.

On notice from Mr. Haywood, for the complainant, an appeal is allowed in this cause from the decree above stated. Bond required in the sum of twenty thousand dollars.

S. P. CHASE,
Ch. Justice, &c., &c.

253 (Indorsed:) U. S. circuit court, fourth circuit, dist. of Virginia. James Bigler, appellant, vs. William Waller et al., respondent. J. K. Haywood, sol. for appellant, 229 Broadway, New York City. Appeal.

254 A true transcript of the record.

In testimony whereof I hereunto set my hand and affix the seal of said court this 14th day of November, A. D. 1870.

[SEAL.] W. H. BARRY, *Clerk.*

255 The following is a copy of a record and proceedings filed in the papers of this cause and made a part of this record.

256 SUPREME COURT:

New York supreme court, city and county of New York.

WILLIAM WALLER
versus.
JAMES BIGLER.

This action was commenced by the service of a summons and complaint on the defendant, December 1st, 1865.

The pleadings and proceedings in the action are as follows:

Complaint.

SUPREME COURT,
City and County of New York, ss:

WILLIAM WALLER
against
JAMES BIGLER.

The above-named plaintiff complains of the above-named defendant, and says that, on the tenth day of May, A. D., 1863, the said defendant made his certain bond or writing obligatory, sealed with his seal, and in the words and figures following, to wit:

257 "$25,000.

"This paper witnesseth that James Bigler, of the State of New York, a resident of Newburgh, in that State, am indebted to William Waller in the sum of twenty-five thousand dollars, which I promise to pay within ten years after this date, and at the periods of time specified in a contract drawn up and signed by myself, through my agent, Mr. H. Hammond, and by William Waller, in his own behalf; and I further promise and bind myself and legal representatives to pay interest on this debt of twenty-five thousand dollars, at the rate of six per centum per annum, punctually, at the expiration of each year.

"Witness my hand and seal this tenth day of May, one thousand eight hundred and fifty-three.

"J. BIGLER. [L. S."]

And plaintiff further alleges that, by the terms of the contract mentioned in said bond, it was specified and agreed that the said defendant would pay the said amount of twenty-five thousand dollars at the periods of time and in the instalments as follows, viz: That, until the tenth day of May, A. D. 1863, one thousand dollars of principal, and the accrued annual interest, at the rate of six per centum per annum on the entire unpaid balance of principal of said debt should be paid by said defendant on the 10th day of May of each and every year; but that, on the said tenth day of May, A. D. 1863, the balance of said principal debt

then remaining unpaid, and the accrued interest, should be all paid by said defendant.

And plaintiff further alleges that the said bond was executed and delivered by said defendant to said plaintiff as a part of the consideration for the purchase of a tract of land which plaintiff had sold and conveyed to him.

And plaintiff further alleges that, subsequent to the execution and delivery of said writing obligatory from time to time, said defendant made payments of principal and interest thereon, so that, on the 10th day of May, A. D. 1861, there was due and unpaid on account of said principal debt the sum of thirteen thousand dollars, and interest
258 thereon, for the period of one year; that, although payment thereof has often been requested, no part of said sum of thirteen thousand dollars, nor of the interest due thereon has been paid; but that said sum of thirteen thousand dollars, with interest thereon from the tenth day of May, A. D. 1860, and interest on each annual instalment of interest from the time it became due, is justly due to said plaintiff by said defendant.

Wherefore the plaintiff demands judgment against said defendant for said sum of thirteen thousand dollars, and interest thereon from the tenth day of May, A. D. 1860, besides the cost of this action.

ALGERNON S. SULLIVAN,
Plaintiff's Attorney, 29 Wall Street, New York.

CITY AND COUNTY OF NEW YORK, *ss:*

Before me personally came William Waller, the plaintiff above-named, who, having first been duly sworn, makes oath and says that the foregoing complaint is true, except as to the matters stated therein on information and belief, and as to those matters he believes it to be true.

WILLIAM WALLER.

Sworn before me this 11th day of November, 1865.

J. SOLIS RITTERBAND,
Notary Public New York County.

Answer of defendant.

Supreme court of the State of New York, city and county of New York.

WILLIAM WALLER
against
JAMES BIGLER.

The answer of the defendant above-named to the complaint of the plaintiff in this action:

259 First. For a counter-claim in this behalf, existing in favor of said defendant and against said plaintiff, arising out of the contract or transaction set forth in the complaint, and also connected with the subject of this action, this defendant states:

1. That, on or about the second day of April, 1853, a contract in writing, and dated on that day, was executed by and between the said plaintiff and the said defendant, under their respective hands and seals, (the same being executed for the defendant by F. W. Hammond, his attorney-in-fact, thereto duly authorized,) and which contract in writing thus executed was, immediately upon such execution, duly delivered by

each of the parties thereto, and became thereupon of full force and effect; and of which contract in writing the following is a copy, to wit:

Copy.

"This memorandum of a contract made and entered into on this second day of April, 1853, between William Waller, of the State of Va., of the one part, and Mr. James Bigler, of Newburgh, State of New York, through his agent, F. W. Hammond, of the second part, witnesseth: That the said Waller agrees to sell to said Bigler the estate of said Waller for the sum of thirty thousand dollars, ($30,000,) on the following terms, to wit: Three thousand dollars before conveyance is made; the second payment at the expiration of two years, two thousand dollars, or more, at the option of the purchaser; and annually thereafter one thousand dollars, or more, at the option of the purchaser, until the whole shall have been paid. The time for the liquidation of the whole amount not to exceed ten years. It is also agreed that the said Waller will allow said Bigler to sell such portions of the land as he may see fit from time to time, the said Bigler paying over to said Waller such proceeds of the sales as will afford ample security for the liquidation of the residue of the debt due for the purchase of said estate from said Waller.

"It is also agreed that the crops now on the land shall be in-
260 cluded in said sale, and be reaped by said Waller, provided said Waller does not sell his slaves to leave the estate before the time of harvest arrives.

"Given under our hands and seals this second day of April, one thousand eight hundred and fifty-three.

"W'M WALLER. [L S.]
"F. W. HAMMOND, [L. S.]
"*For J. Bigler.*

"Teste:
"H. M. WALLER.

"It is understood by the contracting parties that interest on the purchase-money shall not commence to run until conveyance is made.

"W'M WALLER. [L. S.]
"F. W. HAMMOND, [L. S.]
"*For J. Bigler.*

"Teste:
H. M. WALLER."

That the said contract in writing, of which a copy is above set forth, is the same contract mentioned in the bond or writing obligatory set forth in the complaint, and contained mutual stipulations and covenants.

That one of the stipulations and covenants therein contained, to be observed and kept by and on the part of the said plaintiff, is the following, to wit: "It is also agreed, that the said Waller will allow said Bigler to sell such portions of the land as he may see fit, from time to time, the said Bigler paying over to said Waller such proceeds of the sales as will afford ample security for the liquidation of the residue of the debt due for the purchase of said estate from said Waller."

That, after the execution and delivery of the said contract, and of the said bond or writing obligatory, and while the said contract was in full force and effect, the said defendant bargained and agreed to sell to several persons, respectively, portions of said estate or lands, to wit:

261 In the year 1854, a certain portion of about three or four acres to Capt. John Sterling, at the price of $300 per acre, and thereafter another portion to one Capt. Johnson, and thereafter other portions to other parties at proper and advantageous prices therefor; and thereupon and in respect of each and every of said sales, the defendant made due and repeated application to the plaintiff to be allowed to perfect and carry out said sales, respectively, offering to pay over to the plaintiff the whole proceeds of such sales, and to pay to the plaintiff such sums as would afford ample security, with his lien on the residue of the land, for the liquidation and payment of the residue of the said debt due to the plaintiff, but the said plaintiff arbitrarily and contrary to, and in violation of the terms as well as the tenor and meaning of the said contract in writing, absolutely refused to consent or to allow his trustee to consent to said sales, or to any sales of any portion or portions of said estate or land, or to allow the defendant to make or effectuate any sale or sales of any portion or portions thereof whatever. By means whereof, the defendant lost and was deprived of the moneys, profits and advantages, which he would have derived from said sales, and was also compelled to desist from attempting or making any sales of portions of said lands, as it was, by said contract, agreed he might do, and whereby the defendant suffered damages, which, with said profits and advantages, to which he was entitled and of which he was deprived as aforesaid, amount to more than twenty-five thousand dollars, and for which sum the defendant demands judgment against the plaintiff in this action.

2. For a further counter-claim, in this behalf, as aforesaid, the said defendant states that at the time of the execution and delivery of the said bond or writing obligatory, set forth in said complaint, the plaintiff executed and delivered to the defendant a deed of conveyance of said premises, and the defendant, simultaneously, and at the request of the plaintiff, executed and delivered to one Robert Saunders, a trust deed of said premises as collateral security to the said bond or writing obligatory, which trust deed has been, as defendant is informed and believes, burnt and lost, and in which trust deed, it was, among other things, provided and contained, that, to entitle the said trustee

262 to foreclose the lien on said premises, created thereby for the benefit of said plaintiff, a written notice should be given to the defendant of the proceedings to foreclose said lien, and should be published in a newspaper published in the city of New York, for at least sixty days prior to such foreclosure, and prior to any sale of the premises under such foreclosure.

That no such notice was ever given or published by the said plaintiff, or his said trustee, nor any legal or valid foreclosure of said lien, or sale of said premises thereunder ever had; yet the said plaintiff untruly pretending and asserting that there had been a legal and valid foreclosure of said lien, and taking advantage of the disloyal and riotous disposition and practices of himself and neighbors in the vicinity of said premises, unlawfully, and without any authority of law, went on said premises with his agents and abettors, and drove away and ejected therefrom the agents and tenants of the defendant, and placed his own tenants and agents thereon; whereby the defendant was for a long time deprived of the enjoyment and possession of said premises and of the rents thereof; whereby a grist-mill and portions of a dock thereon were burnt and destroyed, and other destruction and damage occasioned, to the damage of the said defendant of at least seventy-five

thousand dollars; and for which sum the said defendant hereby demands judgment against the said plaintiff in this action.

3. For a further counter-claim in this behalf, said defendant states that, after the execution and delivery to him of the aforesaid deed of said premises, and before any default had occurred in respect of the payment of the moneys mentioned in the bond or writing obligatory, set forth in said complaint, the said defendant erected and caused to be put on said premises, valuable improvements, consisting of dwelling-houses, out-houses, a saw-mill, a grist-mill, a dock, and other erections and fixtures, at an expense of over one hundred and fifty thousand dollars, the possession, enjoyment, and benefit of which improvements belonged to the defendant; that thereafter and at various times during the years 1861, 1862, 1863, and 1864, the said plaintiff, combining
263 and conspiring with divers other disloyal and rebellious citizens of the State of Virginia, stirred up, instigated, and incited an unlawful riot and rebellion in the said State of Virginia, and a treasonable insurrection against the laws and Government of the United States, and against the peace and good order of the people of that State and of the United States; that in such riot, rebellion and insurrection, the said plaintiff took an active part; became an officer in the military service of the so-called confederacy, and to the utmost of his skill, cunning and power, exerted himself to overthrow and destroy the authority of the laws and of the Government of the United States within said State of Virginia, and to destroy the property of the loyal citizens of the United States; that to effect such treasonable and unlawful designs, the said plaintiff, with more than three other persons, united with force and arms to overthrow said Government, and to destroy such property; and among the unlawful acts committed by said rioters and conspirators, was the destruction by burning, of the grist-mill aforesaid, and the dock or wharf aforesaid, belonging to the defendant, and erected and constructed by the defendant on the premises aforesaid; and that the damages occasioned by said unlawful destruction and burning of said grist-mill and wharf and which the defendant has thereby suffered, amount to at least the sum of seventy-five thousand dollars; for which sum the defendant hereby demands judgment against the said plaintiff in this action.

Second. And for a separate and further defence to the supposed cause of action alleged in said complaint, said defendant denies that the terms of the contract mentioned in said bond are correctly set forth in the said complaint; and, on the contrary thereof, avers that the whole of the said contract and the terms thereof are hereinabove copied and set forth, and the defendant here refers to the same as if the same were, in this separate defence repeated.

Said defendant also avers that the bond or writing obligatory, was executed in part fulfilment of said contract; and it was at the
264 same time, understood and agreed by and between the said plaintiff and defendant that the said contract should continue in full force and effect, and that the plaintiff should keep and perform the covenants and provisions thereof, on his part and behalf to be kept and performed; that said plaintiff has not kept and performed the provision and covenant hereinabove particularly recited in respect to allowing the defendant to sell such portions of the land as he might see fit from time to time, but has failed and refused to keep or perform the said provision or covenant in the manner in this answer hereinbefore particularly stated and to which defendant refers as a part of this defence; wherefore the

plaintiff is not entitled to claim or demand the payment of the moneys mentioned in said bond.

And the defendant denies that there is due or unpaid, on account of said bond or the debt mentioned therein, the sum or interest alleged and demanded in said complaint, or any sum whatever.

Wherefore the said defendant demands judgment against said plaintiff for the sum of one hundred thousand dollars, with the costs and disbursements of this action.

E. L. FANCHER,
Attorney for Defendant.

CITY AND COUNTY OF NEW YORK:

James Bigler, the defendant above named, being duly sworn, says that the aforegoing answer is true to his knowledge, except as to the matters therein stated on his information and belief; and, as to those matters, he believes it to be true.

J. BIGLER.

Sworn this 6th day of January, 1866, before me.
E. FRANCIS HYDE,
Notary Public in and for the City and County of New York.

265 *Reply.*

Supreme court, city and county of New York.

WILLIAM WALLER, PLAINTIFF,
vs.
JAMES BIGLER, DEFENDANT.

The plaintiff replying to the answer of the defendant herein, alleges as follows:

As to the first counter-claim in said answer set forth, plaintiff says he has not knowledge or information sufficient to form a belief as to the truth of the allegations in folio' 7 and 8 in said answer in respect to said defendant's alleged agreements and bargains to sell to the persons named in said answer or to any one else, any portion or portions of said estate or lands referred to in the complaint and answer.

And plaintiff denies that said defendant, in respect to either of said alleged sales, ever offered to pay or tendered to this plaintiff, such sum or sums as would have afforded ample security to the plaintiff for the liquidation of the residue of the debt for the purchase of said estate.

And plaintiff denies that he did, in violation of the contract between the plaintiff and defendant in respect to said land, refuse to allow said defendant to sell any portion of said land, if said defendant would comply with the conditions of said contract.

And the plaintiff further says he has no knowledge or information sufficient to form a belief, as to whether, by means of any such supposed and alleged refusals on his part, the defendant suffered any loss of profits or damages whatever, and plaintiff denies that defend-
266 ant did suffer any damage or loss of any profit in respect to the matters set up in said counter-claim, by reason of any wrong or default on the part of this plaintiff, or that said defendant ever incurred in said matter in respect to said supposed losses of profits and said damages, damage in the sum of twenty-five thousand dollars or in any other sum.

As to the second counter-claim set forth in said answer—

Plaintiff says that when the bond of the defendant set forth in the complaint herein was executed, it was subsequent to the delivery by this plaintiff to said defendant of a deed for the land referred to in in said complaint, although it was on the same date and at the same interview.

And plaintiff further alleges that the said defendant, at the time of delivering said bond, also delivered to Robert Saunders a duly executed deed of trust on said land to secure the payment of said bond as alleged in said counter-claim, and plaintiff says that he has not the original or copy of said deed of trust, but, upon information and belief in respect thereto, he denies that in said deed of trust it was provided that to entitle the said trustee to foreclose the lien on said land, created by said deed, a written notice should be given to the defendant of the foreclosure proceedings, or that a notice thereof should be published in a newspaper in the city of New York for sixty days prior to such foreclosure, or prior to any sale under such foreclosure.

And plaintiff, further replying, denies that there have been any illegal proceedings by him or for his account to his knowledge or belief under said deed of trust, and he denies all of the allegations in said answer herein beginning at the first of folio 14 in the said answer, and to the close of the second counter-claim in said answer; and he denies that he damaged the defendant in respect to the matter set out in said counter-claim, in the sum of seventy-five thousand dollars or in any sum.

For a further reply, plaintiff says, in respect to the third counter-claim contained in said answer, that he admits that said defendant erected various buildings and improvements on said land, but
267 plaintiff has no knowledge or information sufficient to form a belief in respect to the expense of said buildings and improvements; and as to the other allegations in said counter-claim, plaintiff denies each and every one, except that he admits that, during a part of the period referred to, he, said plaintiff, served in the army of the late Confederate States, in the late war between them and the United States, and that the plaintiff served as aforesaid, to the best of his ability, in accordance with the laws of war.

But plaintiff explicitly denies all knowledge of, privity to, or any personal connection with, or agency in, any of the alleged injuries, destruction, and damage to the personal property of the said defendant.

And plaintiff further alleges that he has, before the commencement of this action, received from the Government of the United States pardon and amnesty in accordance with law, for his participation in said war, and that he is relieved from all disability at law by reason of anything done in said military service as aforesaid.

Wherefore said plaintiff prays for judgment herein in accordance with his complaint, and that said counter-claim be dismissed, and for his costs.

ALGERNON S. SULLIVAN,
Attorney for Plaintiff.

CITY AND COUNTY OF NEW YORK, *ss:*

Algernon S. Sullivan, being duly sworn, says that he is the attorney for the plaintiff in the above-entitled action; that the foregoing reply is true of his own knowledge, except as to the matters therein stated on information and belief, and as to these matters he believes it to be true; that the reason why this verification is not made by the plaintiff, is, that the plaintiff does not reside in, nor is he now within, this State, and

that the grounds of affiant's belief, as to the allegations set forth in the foregoing reply, are papers pertaining to the subject of this action, and written communications received by affiant from the plaintiff, in
268 respect to the matters and things involved in this action, and which papers and written communications are in affiant's possession.

ALGERNON S. SULLIVAN.

Sworn to before me this 21st day of March, 1866.

JOHN A. FOLEY,
Notary Public.

The action by an order of the court, made by Honorable E. Darwin Smith, a justice thereof, was, on the 4th day of February, 1867, referred to Luther R. Marsh, esq., of the city of New York, counsellor at law, as sole referee to hear and determine the same.

On the fifth day of February, 1867, the parties appeared, by their respective attorneys, before the referee, and the defendant having the affirmative in the case, opens the same.

Mr. Fancher, of counsel for defendant, reads an order of reference granted yesterday, referring this action to Luther R. Marsh, esq., and allowing the defendant to proceed and examine any of his witnesses on one day's notice.

Mr. Fancher also reads admission of service of notice of this reference for this day at 10 o'clock a. m.

MARCUS B. KNAPP being called by defendant, and duly sworn, deposes as follows:

Mr. Fancher:

Q. What is your name?
A. Marcus B. Knapp.
Q. Where do you reside?
A. I reside in Virginia.
Q. At what place in Virginia?
A. My house is in York County.
269 Q. Do you know a place known as Bigler's Mills?
A. Yes. It is known as Ripon Hall. It is also known as Bigler's Mills.
Q. You know Bigler—Mr. James Bigler—the defendant in this suit?
A. Yes.
Q. Do you know the plaintiff in this suit?
A. Yes, sir.
Q. When did you first know this place called Bigler's Mills?
A. In the fall of 1855.
Q. Did you go there for any purpose?
A. I went there as clerk or storekeeper for Mr. Bigler.
Q. How long did you continue in his employ?
A. I continued until the fall of 1859.
Q. Have you been a resident in that vicinity ever since?
A. Yes. And during the war I resided in no fixed locality; but never out of Virginia.
Q. In the fall of 1859 you were in possession of Mr. Bigler's place?
A. I was on the place during 1859—all of 1859.
Q. During 1859, what happened with regard to this place?
A. Mr. Bigler made an assignment in that year. He had other agents to take care of the place?

Q. You don't know anything with regard to the assignment? I will ask another question. Did you ever go into possession under the confederate authorities?

A. I did; in the spring of 1861.

Q. Who put you in possession? Under whose authority were you?

A. At first Mr. Bigler's agent left it with me in April, 1861; besides Mr. Bigler wrote me a letter authorizing me.

Q. How long did you remain in possession under Mr. Bigler?

A. Till June, 1861.

Q. What happened then?

A. It was taken possession of by Gen. Magruder.

Q. What became of the property then?

A. The personal property was turned over to the quartermaster's department. The mill was taken possession of by the quarter-
270 master's department, and the other buildings were used as hospitals.

Q. What buildings were on the place?

A. There were a great many. I presume about eight or ten, besides barns and cow-houses.

Q. Were there any mills?

A. There was a large saw and grist mill, and a blacksmith shop.

Q. Was there a dock on the place?

A. And a long dock.

Q. Who constructed these buildings?

A. Mr. Bigler. They were put up under his orders.

Q. Under the quartermaster, what did they do with the mill?

A. They seized the lumber, and used the mill in grinding corn.

Q. And the products of the mill went to the confederate authorities until what time?

A. About the first of May, 1862.

Q. At this time was there any lumber on the place belonging to Bigler?

A. Yes, sir.

Q. About how much?

A. About a hundred thousand feet, including ties. Ties were sawed lumber. They were cut square.

Q. Were you personally on this place in March, 1862, when there was a pretended sale under a trust deed?

A. Yes.

Q. Did you see the plaintiff, William Waller, there?

A. Yes, sir.

Q. Who else was there?

A. Mr. Saunders, besides a good many other parties.

Q. What happened at the sale? Was the place put up and sold?

A. Yes, sir.

Q. Who purchased it? Who bought it in?

A. Mr. Waller.

Q. Do you know for how much?

A. Seventy-two thousand dollars.

Q. After this sale, did you continue in possession under Mr. Waller?

271 A. Not under Mr. Waller; under the confederate authorities.

Q. How long did you continue in possession then?

A. Until after the evacuation of the peninsula by Johnston, from some time in March till May, less than two months.

Q. Do you know whether Waller put any one in possession of the place after that?

A. I don't know that he did.

Q. Do you know anything about H. P. Kellum's possession?

A. I don't know positively. (He stated that he had charge of it for Waller.)

(Objected to as heresay by plaintiff's counsel.)

Q. Was the plaintiff, Waller, in any way connected with the confederate authorities? Do you know? Did you hear him say that he was?

A. Yes; I heard him say that he was.

Q. How?

A. I think that he was an aid for some general in Charleston for a portion of the time.

Q. What did you hear him say?

A. I heard him say that he was.

Q. After this sale, was there any damage or distruction to any of this property? and if so, what?

A. The mill was burnt and so was the grist-mill, and portion of the wharf.

Q. Were you present at the fire?

A. I was there at the time, and saw it in flames.

Q. Do you know how the fire originated?

A. I believe it was set on fire by the confederate cavalry under Col. Duke.

Q. Do you know what the cost of the mill and dock was?

A. I don't know positively the cost. We used to calculate that the wharf cost twelve thousand dollars.

Q. In your judgment, would you think that a fair estimate of the value?

A. I think it cost that.

272 Q. What did the mill cost?

A. About twenty thousand dollars.

Q. What was the value of it in your judgment; can you tell?

A. I think the wharf cost more that the value.

Q. I am speaking of the mill.

A. I never considered the real value of the mill more than ten thousand dollars.

Q. You live down there now?

A. Yes.

Q. Friend of this plaintiff Waller?

A. Yes.

Q. Did Waller, the plaintiff, at any time ask you to remove the property off this place?

A. (He gave me permission to remove some iron after the burning of the mill.

Q. What time did he give you that permission?

A. Some time after the burning of the mill—probably in 1863 or 1864.

Q. Did he ever want you to remove any property from the mill; and if so, what, and to what place?

A. He said that if another party and me would remove the engine and boilers to the White House, he would give us for our compensation for so doing all the old iron that remained at the mill.

Q. On whose account did he want this removal made?

A. He didn't say; on his own I presume.

Q. Did he have possession of the buildings at this time?

A. (He assumed that he had. The impression on me was that he held possession of this place and claimed the property as his own. However, he didn't state in so many words.)

Q. Do you know whether he ever received any money from the confederate government for the use of those mills?

A. He never told me so.

Q. Do you know whether Waller was, in fact, possession of the place?

A. No; I don't know it.

Q. Did you ever see him there?

273 A. Yes.

Q. Did you ever see him there when Kellum was acting as agent?

A. No; I never saw him there.

Q. Do you know that Waller advertised the place for sale?

A. I don't know; I never saw the advertisements; I don't recollect seeing them.

Q. In April, 1861, did you see the plaintiff, Waller, and his cousin, Mat. Waller, on that place?

A. I recollect seeing Mat. Waller there. I don't recollect positively of seeing William Waller, but I heard it said he was there at the time.

Q. Are you willing to swear that you did not see him there at that time?

(No answer.)

Q. You have a positive recollection of seeing his cousin Mat. Waller?

A. Yes; I have.

Q. Were there other parties there at that time—and state who they were—in April, 1861?

A. There were so many parties there at that time I don't recollect who they were.

Q. Didn't a party of mounted horsemen go there, assuming to call themselves the home guard?

A. Yes.

Q. Were you present when they were there?

A. Yes.

Q. Were you among them?

A. I was.

Q. I want to know what this party did on that occasion; where did they come from?

A. From Williamsburg.

Q. How far off?

A. Six miles.

Q. Were they armed?

A. Yes, sir.

Q. What did they do with respect to Mr. Bigler's place, and his tenants on the place; didn't they warn those men there?

274 A. They told the agents that there was a war about to commence, and those who sympathized with the North and wished to go North had better go north at that time, and those who wished to stay had better stay. That was the advice given at that time.

Q. What happened after that?

A. Mr. Bigler's agent left there, and some of his other employés left with him.

Q. Did any of them stay; and how long?

A. Some stayed through the whole year, and others till after McClellan's retreat before Richmond.

Q. Can you name anybody that stayed there?

A. Yes; there was a man named John Williams, another named William MacIntyre.

Q. Did they take sides with the South in the war?

A. I think a portion of them were in the employ of the quartermaster's department, but none of them in the army, until the mill was burned.

Q. How long was that guard there that day?

A. About two hours, I think.

Q. Do you know how Mat. Waller got there; where he came from?

A. He came from his own place.

Q. Where was his own place?

A. That was adjoining.

Q. After this fire, did you ever see the plaintiff at any place when a conversation ensued with reference to the burning of this mill?

A. I saw him afterwards at Richmond.

Q. About what time?

A. I think it was in the fall of 1862.

Q. What did he say on the subject of the mill; did he say anything respecting the mill?

A. He spoke of the burning of the mill.

Q. What did he say about it?

A. He asked me my opinion of the value of the mill and wharf?

Q. What else did he say, if anything?

A. He might have said other things; we were conversing together some time.

Q. Did he say anything about getting his pay for the mill?

275 *H.* He said that he was making an attempt to get his pay for the burning of the mill from the confederate government.

Q. That was the reason he wanted you to value it?

H. Yes; that was the reason.

Q. Did he fix any value himself at that time?

H. I don't recollect that he did.

Q. Do you know whether he got paid for his mill from the confederate government?

H. I don't.

Q. Do you know whether he received rent for the use of this mill?

A. I don't know.

Q. Have you heard him say anything about it?

A. No.

Q. Do you know a man by the name of Captain John Sterling?

A. I did know him; he is now dead.

Q. Did you know Captain Johnson?

A. Yes. He is also dead.

Q. Did you know anything about their attempting to purchase portions of this place from Mr. Bigler, while Mr. Bigler held possession before the war?

A. Yes.

Q. Well, tell what you know about it?

A. Matt. Waller and Mr. Bigler and a man named Jones were negotiating for a part of this property. For some reason they didn't seem to purchase.

Q. Do you know what that reason was?

A. Not positively.

Q. Did you ever hear the plaintiff state the reason?

A. No; I never heard it from him.

Q. About how large was this place on York River; how many acres did it contain?

A. About twenty-four hundred acres.

Q. Was there any building of any value on the place before Mr. Bigler took it?

A. There was no building of any value.

Q. Were you there when the buildings were going up?

A. Yes; when the greater part of them were going up.

Q. Mr. Bigler put on peach trees?

276 A. Yes; I believe about twenty thousand, and some fence.

Q. He made a good deal of fence?

A. Yes, sir.

Direct examination concluded.

WILKINSON DEAN, a witness called by the defendant, was then duly sworn, and deposed as follows:

Mr. Fancher:

Q. Where do you reside?

A. I reside in Virginia, in York County.

Q. At what place?

A. At a place known as Bigler's Mills, on York River.

Q. Engaged in business there now?

A. Yes, sir.

Q. When did you first know that place?

A. I went there for Mr. Bigler in 1853, first in December—some time in December.

Q. You went there for the defendant?

A. I worked for Mr. Bigler.

Q. What did you go to do?

A. To work on a mill.

Q. Was he erecting it?

A. Yes.

Q. What kind of a mill?

A. A saw-mill and grist-mill.

Q. When was that mill built?

A. It was built that winter and the following spring. It was finished in the following summer.

Q. At whose expense was it erected?

A. At Mr. James Bigler's expense.

Q. Did the defendant, Mr. James Bigler, erect anything else on the premises at that time?

A. A small-sized house, and a boarding-house.

Q. Put all the houses together, and tell us how many houses the defendant erected?

A. He erected seven houses.

Q. One you say was a boarding-house?

277 A. The first one was of wood.

Q. Was there not a brick boarding-house?

A. That was built next year. The first one was burnt down.

A. Do you recollect about the dock? About how long was it?

A. It was over two thousand feet in length.

Q. Did he erect any barns there?

A. Yes, sir.

Q. How many?

A. Four.

Q. Any other buildings?
A. Four corn-houses.
Q. Did he sink any wells?
A. Yes, sir.
Q. How many?
A. Seven wells.
Q. Do you remember anything else that he did to improve this property?
A. He made a great deal of fence.
Q. Did he erect a blacksmith's shop?
A. Yes, and a carriage-house; both one building.
Q. Brick-yard?
A. Yes; a brick-yard.
Q. Did he put the machinery in?
A. Yes; and set it agoing.
Q. Do you recollect anything about peach trees?
A. He set out a large quantity, over twenty thousand, so they told me.
Q. How large a span did they cover?
A. Two or three hundred acres; about two hundred, I think.
Q. Any grape vines?
A. About five acres?
Q. Do you know what kind of grapes?
A. Various kinds: Catawba, Isabella; three or four different kinds.
Q. Did he do anything towards grading embankment on the river bank?
A. Yes; a great deal.
Q. Do you 'now at what expense?
278 A. I don't know particularly, but I think eight thousand or ten thousand dollars, brick-yard and all.
Q. Do you know what the value of the mill was?
A. No; I don't know that.
Q. Or the dock?
A. The calculation was that the dock cost ten or twelve thousand dollars, as I understand from the head clerk.
Q. Was it worth that? Was it a proper cost?
A. I don't know as a dock of that kind could be put up at any less cost.

(The foregoing examination of Mr. Dean was read at this point to Mr. Sullivan, of counsel for plaintiff, who had just entered, and who objected to the whole thereof, on the ground of irrelevancy.)

Examination resumed:

Q. Did you ever see the plaintiff, William Waller, in this place?
A. Yes, sir; I saw him there.
Q. Do you know whether he ever had charge of it or possession of it?
A. Nothing but what I knew from the men on the place.
Q. Do you know whether Mr. Waller had a superintendent on the place at this time?
(No answer.)
Q. Do you recollect April, 1861, when a company of men—mounted men—came there?
A. I was not there; I met them coming *coming* back as I was going to the place.
Q. What do you mean by them? Describe them?
A. Some had double-barrelled guns, and some had single-barrelled guns; they were on horseback, and called a home-guard.

Q. Where did you meet them?
A. They were going from Bigler's Mill, on the way to Williamsburg.
Q. When was that?
279 A. That was in April, 1861, a few days after the ordinance of secession passed; I can't tell just what day.
Q. Where did you go after you met them?
A. I went on to Bigler's Mills.
Q. Did anything transpire with respect to Bigler's tenants on the place?
A. Several families left the next morning.
(Objected to by Mr. Sullivan.)
Q. At that night several of those families left?
(Objected to by Mr. Sullivan, and question withdrawn.)
Q. How many of the tenants left that morning? Did half or quarter?
A. I can't tell you; I think four families left that morning; I forget just the names now that left that morning; his head man left—the man who had the charge.
Q. Do you know if this property, at any time, was in possession of any one except Mr. Bigler; if so, who?
A. From what time?
Q. From that day up to now?
A. He sold the property.
Q. I want you to go back to the first time when you knew anybody to be in possession of the property, except defendant or his agents?
A. I don't know.
Q. Were you ever in possession under the confederate authorities?
A. I was there four months under the confederate authorities.
Q. Was the defendant on there, or his agents?
A. No; but the defendant still owned the property.
Q. Did you not have charge of that mill during those four months, when in possession of the confederate authorities?
A. Yes.
280 Q. What was done with the products of the mill during that time?
(Objected to by Mr. Sullivan.)
A. It was shipped to Yorktown to the confederate military authorities there.
Q. What was sent from the mill to Yorktown?
A. It was lumber of various styles and measures, and some meal.
Q. How much lumber was sent?
A. I don't know as I may be able to tell you. I got shipping bills to the amount of one hundred and fifty to two hundred thousand.
Q. That is the shipping receipts you mean, the receipts sent back to you?
A. Yes.
Q. Was any of that lumber Bigler's lumber, and on the place before the confederate authorities took control?
A. Yes, sir.
Q. How much?
A. I don't know exactly. It was over one hundred and fifty thousand—I think the bills note.
Q. What was that lumber worth, do you know, a thousand feet?
A. Fifteen dollars.
Q. It was selling for fifteen dollars a thousand feet?
A. Yes, sir.
Q. What was this lumber worth in gold at that time?

A. I don't know what it was worth in gold at that time. There was not much difference between gold and other money at that time there. There was a little difference, but I forget what difference—ten or fifteen per cent.

Q. Was that mill burned?

A. Yes, sir; that mill was burned.

Q. When?

A. About the first of May—between the third and fifth of May,
281 1862. I was not there the day it burned, but I went there soon afterwards.

Q. Tell whether it was a month, six weeks, ten days, or what time?

A. I can't tell exactly, but it was very soon afterwards. It was within a month.

Q. Was there any damage or destruction to the wharf or dock?

A. Yes, sir; the wharf was burned. It was not all burned—it was burned in spots along.

Q. Was it so destroyed as to injure it any?

A. Yes; the bulkhead was all burned where the shipping lay.

Direct examination closed.

Cross-examined by Mr. Sullivan.

Q. Where did you live before you went down to go into the mill of Mr. Bigler?

A. I lived in Ulster County, in New York State. I went from Newburgh.

Q. Mr. Bigler resides in Newburgh, does he not?

A. Yes, sir.

Q. He employed you at Newburgh to go down there, did he not?

A. Yes, sir.

Q. In what capacity did he retain you to go down there?

A. To go down there to work to help erect a mill there was down there.

Q. Was that in the year 1853?

A. Yes, sir; in the fall of 1853.

Q. From that time until the present time, in whose employment have you lived besides that of Mr. Bigler?

A. I worked for Mr. Bigler in 1859, I think it was on the place; and then I worked on a mill at Williamsburg for Mr. Leytle; and in 1860 I went to a mill called Lambert's Mills, near Jamestown. I was residing there when I went back to take charge of this mill for the con-
282 federate government, in 1861. My family lived there, near Jamestown.

Q. Since your return to this farm in 1861, as stated by you, how much of the time have you spent on that farm and in Mr. Bigler's employ, if any?

A. I spent from May—I forget just what day in May—after the war closed, 1865, until December, by the month, for him.

Q. Until December of what year?

A. December, 1865; and after that I took the place on shares.

Q. You mean the Bigler farm?

A. Yes; on shares with Mr. Bigler.

Q. And have remained in that position ever since?

A. No, sir.

Q. How long?

A. That closed in June or July, and Mr. Bigler sold the place, and the papers date from July.

Q. Of what year?
A. 1866.
Q. Do you still remain there at the Bigler Mills, working at the mills?
A. No, sir. Farming on my own account.
Q. What interest has Mr. Bigler in your business, or you in his, now?
A. He has no interest.
Q. Either way?
(No answer.)
Q. When did you come to New York from your residence?
A. I started last Sunday morning; a week ago Sunday morning?
Q. At whose instance and engagement did you come—Mr. Bigler's?
A. Mr. Bigler's.
Q. At whose expense did you come?
A. Mr. Bigler's. He is to pay me, I suppose; I did'nt come for nothing.
Q. Has there been any agreement as yet as to what he is to pay you for your expenses and your time?
283 A. No, sir; I expect to get what the law allows; that is all.
Q. Did he say that?
A. No, sir; that is what I expect to get; that is all.
Q. How often have you seen the plaintiff in this case?
A. From what time?
Q. From the time you went there?
A. From the time I went to Bigler's? I can't tell you, sir.
Q. Do you mean by that you went there so often?
A. He used to come down two or three times a year generally.
Q. Before the war?
A. Yes.
Q. Have you any knowledge what the different improvements that you have spoken of cost, other than that which Mr. Bigler has stated to you?
A. How is that again?
Q. You have stated about some improvements on the Bigler farm. Have you any knowledge as to what those improvements cost, except as to what Mr. Bigler has told you?
A. Mr. Bigler never told me as to what the building cost.
Q. Did you pay the bills or see them paid, so as to have any positive knowledge on the subject?
A. No, sir.
Q. Is that a fact also with regard to the other improvements, as the wharf, the dock, or the bulkhead?
A. I judged the cost of that from the amount of lumber that was taken. I had access to the books, and saw the amount of lumber that was taken out of the mill. I merely judged of that. I am not positive as to what it cost.
Q. The band of mounted men of whom you have spoken, how far from Bigler's farm did you say that you met them?
A. About two miles.
Q. Name such as you knew, and state where they reside?
A. Goodrich Durfey; he resides at Williamsburg.
284 Q. Who else?
A. His brother was there.
Q. Does he live in the same place?
A. Yes, sir; he is dead now.
Q. Who else?
A. I can't tell you exactly; several passed me; I spoke to the brother;

I could not call the names of any others; I didn't notice particularly who passed me; it was just after sundown; I didn't notice particularly; there was quite a number passed.

Q. What do you mean by quite a number; a hundred?

A. Not over ten or fifteen.

Q. Did you know any of them at the time, that you can't now recollect, except Colonel Durfey and his brother?

A. There were some there I knew at the time, and there were some there I didn't know.

Q. But you cannot now recollect any except Colonel Durfey and his brother?

A. Well, those are the two; his brother stopped and talked with me, and those that passed I did not recognise who they were; the others passed me, and I didn't notice any of them; I didn't notice them to recall their names.

Q. Did you not say, a few minutes ago, that at the time you recognised and knew several others, but that you now forget their names?

A. No; I don't recollect of saying anything of that kind.

Q. Was the plaintiff one of them; did you recognise William Waller there?

A. No, sir; I did'nt see him.

Q. When you arrived at the farm on that occasion, how long did you stay there?

A. I stayed there all night—until the next morning.

Q. Was the defendant, Mr. Bigler, there?

A. No, sir.

Q. Who, at that time, was the agent—the superintendent of the farm, for Mr. Bigler?

A. A man by the name of Evans; I think he had charge; there was another agent by the name of Southwell; I think he had charge of the books at that time.

285 Q. Where are they now?

A. I don't know, sir; only what I heard.

Q. Are they there, down about the mill and farm?

A. No, sir.

Q. Where did you say you were before you went up to the farm in the employ of the confederate authorities?

A. Where was I before I was in the employ of the confederate authrities?

Q. Yes, sir.

A. I was in a mill, in the employ of the confederate authorities; I was living below Jamestown.

Q. Who employed you; give me the man's name?

A. It was an order from General Magruder, through the quartermaster's department; it came from the quartermaster's department at Yorktown.

Q. Who brought it to you?

A. I don't know that I can tell you; it was one of the soldiers; that is, he was in the employ of the quartermaster's department there.

Q. Was the order delivered to you in writing from the quartermaster?

A. I think it was.

Q. Have you a copy of that order, or have you the order itself?

A. No, sir.

Q. What did you do with it?

A. It got lost, and got away with other papers; I didn't take care of it at all.

Q. Was it sent as a military order from the quartermaster; are you certain of that?

A. I don't pretend to say how it was; the paper was read to me, and I went.

Q. Was it in the form of an order—a military order?

A. Bloomfield, his name was.

Q. Was it in the form of a military order, or was it a request?

A. I don't know how a military order is; it was to be at that place, and take charge of the mill.

Q. Was it a contract, or was it an order; you certainly can recollect that?

A. It was no contract.

286. Q. Was it not a military order; just say yes or no, or that you can't recollect?

A. I don't recollect what form it was in, sir; I went there after I got that notice, anyway, whatever it was, to take charge of the mill.

Q. Was the name of this man Bloomfield signed to the order, as it was read to you?

A. I don't know; it was either him or his deputy, N. White; I don't know which of the names was to it.

Q. As quartermaster?

A. Yes, sir; Mr. Bloomfield was not there all the while.

Q. Why did you go; because you felt you had to go?

A. Of course I went over because I supposed I had to go; I didn't make any questions about that matter.

Q. At that date were there any military forces in that vicinity, and in possession of that district?

A. Yes, sir.

Q. The entire district; down to Fortress Monroe?

A. I suppose there were; General Magruder had his headquarters at Yorktown; I don't know what force was there.

Q. Had he any army?

A. Yes; there was an army; how many men I can't tell you.

Q. Were Jamestown, where you were, and Bigler's farm, in the disdrict commanded by Gen. Magruder?

A. Yes, sir; he had command of the peninsula, I believe; he had command of the most of it, including the district around Yorktown and Bigler's Mills.

Q. Well, which army was it, a United States Army or a confederate army?

A. It was a confederate army, under Gen. Magruder.

Q. At that date whose military orders controlled in that district; was there any army besides the confederate army in that district at that time?

A. No.

Q. Whose military orders controlled there?

A. The confederate.

Q. Was Mr. Waller present when that order was served on you?

A. No, sir.

287 Q. How soon did you obey it?

A. I went the next morning.

Q. Up to Bigler's Mills?

A. Yes, sir.

Q. Had any one after orders of Gen. Magruder, accompanying you to superintend your work at the mills, or direct you what to do there?

A. I got my orders from the quartermaster's department; I made the lumber; I superintended that myself.

Q. When you say the quartermaster's department, do you mean the same officer, Bloomfield, that you have referred to?

A. Bloomfield; yes, sir.

Q. In whose army was the quartermaster, Gen. Magruder's?

A. He was there under Gen. Magruder then; he was district quartermaster for that army; it lay around Yorktown.

Q. Now tell me what order he gave you with regard to working these mills and disposing of the lumber?

A. He gave orders for certain sizes for building and lumber.

Q. Did he, as quartermaster, order you to run the Bigler's mills and saw lumber?

A. Yes, sir.

Q. Did he order you to do it for military use?

A. It was done for military use.

Q. Did he order you to deliver the lumber, when it was made, to his officers in his army?

A. He would send vessels up there, and I would load them: his order would come to deliver such a size, such dimensions.

Q. But he always sent these orders as quartermaster?

A. Well, he or Mr. White would; that is, his assistant quartermaster; I don't know as he did it always.

Q. Did Mr. Waller bring away those orders to you from the quartermaster?

A. No, sir.

Q. Did you deliver any of that lumber which you sawed in the Bigler's mills to Mr. Waller?

A. No, sir.

288 Q. What kind of vouchers and receipts for the lumber that you delivered did you give?

A. I gave a common bill of lading, and then would take a duplicate of it, and file it. I would take a copy of it, and file it.

Q. Didn't you get a receipt of each amount of lumber?

A. Yes; I got that when I took my bills down.

Q. From whom did you get those receipts?

A. I would get them in the quartermaster's department.

Q. Did you get such receipts for all the lumber that you delivered from the Bigler farm and mills?

A. I think I did; pretty much all; there might have been some that I didn't.

Q. Your intention was to get all, and that was your belief?

A. Yes; that was what I wanted. I presume I did.

Q. Were those receipts intended for vouchers to present to the proper department, upon which to collect the bills for the lumber?

A. I don't know what they were intended for. I merely kept an account debt and credit to the quartermaster's department; debit what I would send away, so much lumber shipped to Yorktown on such a day.

Q. Did those receipts specify the numbers and value of each pile of lumber?

A. No, sir; not the price of it.

Q. Did that account charge anything as for the price or value of the lumber?

A. I didn't keep any account.

Q. Have you a copy, or did you keep copies of the receipts and vouchers that the quartermaster's department gave you?

A. I have a good many.

Q. Have you them here?

A. No, sir. I may have lost some of them, but I have a good many of them home.

Q. For the lumber from the Bigler farm?

A. Yes, sir.

Q. During that period, when you were employed running the Bigler mills, did you receive any pay?

289 A. Yes, sir.

Q. Who paid you?

A. The confederate government.

Q. I don't mean who paid you: I mean what person?

A. I think it was Mr. White that paid me. He was the man who was in when I drew the money. I mean Mr. White, the assistant quartermaster.

Q. Did you draw your salary during your employment, or at the close of it?

A. At the close of it.

Q. Did you give, at the time you received it, a receipt to the assistant quartermaster?

A. Yes; I think there was a receipt passed in some form. I can't tell what form it was. It was in the military order or style somehow.

Q. On what book did you keep the account of the lumber delivered?

A. On the books of Mr. Bigler that were in the mills and in some seperate books of our own; on some seperate books of the government that were there at the mills. They were not all Mr. Bigler's books. I don't know what they were hardly.

Q. Do you know who has them now?

A. No, sir.

Q. What memorandum have you that enables you to tell, as you have said, the quantity of lumber you have shipped to the quartermaster?

A. Nothing properly, only their shipping bills, that I have retained.

Q. You stayed, I think you have said, running the mill about four months?

A. I think it was about four months, between three and four months, that I got pay. I think that I can tell exactly; let me see; it was about four months.

Q. When you left the mill, did you go back to your home at *Johns*-town?

A. Yes, sir.

Q. Did you come to reside after that, during the war any time, at the Bigler farm?

A. No, sir; that is, not until May, 1865; not till after the evacuation of Richmond. We call that the end of the war.

290 Q. Were you present when any of the buildings of which you have spoken were destroyed?

A. No, sir.

Q. Were you present when the buildings which you have referred to were burnt?

A. No, sir.

Q. Have you any knowledge with reference to the injury that was done to them, except from hearsay and report of others?

A. The mill was all destroyed.

Q. Have you any knowledge with regard to the fact; have you any knowledge with regard to the circumstances of the burning of any houses on the Bigler farm other than the report of others?

A. No, sir.

Q. How recently, prior to the burning of the dock, had you seen it? You have spoken of the bulkhead, I believe you call it?

A. I can't tell you exactly that. Let's see—

Q. A month, two months, three months? I don't want to know the precise number of days.

A. I left there in September. I don't know how many times I was there during that winter. I was there once between the time of leaving there and spring.

Q. Was it a few months before?

A. Yes; a few months.

Q. How soon did you visit the Bigler farm, and see this destruction; before the date of what is commonly called the seven days' battles between the confederate army and the United States Army under Gen. McClellan?

A. I don't know that I can tell you what day; but it might have been a month after the evacuation of the confederate troops there. I don't know what time it was. A few weeks afterwards.

Q. Do you know, of your own knowledge, which army destroyed the wharf and dock; whether it was the confederate army or the Union Army?

A. No, sir. I was not there when it was destroyed.

Q. Who is the man whom you have spoken of as having been on that farm during the war, connected with Mr. Waller?

291 *A.* You asked some question about a superintendent of some kind. Was there any one? If so, say so.

A. I don't know of any one, only by hearsay. That is all.

Q. Now I ask you a question. During the time when Mr. Bigler was absent from that farm, of your own knowledge do you know of any one being on that farm as the agent or employée of Mr. Waller?

A. No, sir.

Q. How long was Mr. Bigler absent from that farm?

A. Well, sir, I didn't see him there till May, 1865.

Q. From what date?

A. Previous to the war. I don't know what date it was; just before the war; some time in that year. I didn't see him on the place until 1865 again. Then he came on my place.

Q. During all that time who acted for Mr. Bigler as agent on the farm?

A. I have no positive knowledge.

Q. What knowledge have you on the subject?

A. Only what I heard people say.

Q. And Mr. Bigler?

A. No; I never heard Mr. Bigler say.

Q. Always when you were there was there some one who professed to represent Mr. Bigler?

A. Before the war.

Q. During the war, when Mr. Bigler was absent?

A. No, sir. There was no man who professed to represent Mr. Bigler.

Q. Were the tenants in possession of the farm; did they continue there?

A. After the war?

Q. Yes.

A. They lived there a little while; some of them did; most of them left that summer after the war; most of them lived on the place till fall.

Q. Did some of the tenants remain on the farm during the entire war?

A. Some of the men that worked in the place for Mr. Bigler remained on the place during the whole war.

292 Q. Some of the men who had gone down there in Mr. Bigler's employ at the commencement?

A. Yes; some of them; let me see; I can tell you some of their names.

Q. Well, give me the names of some of them.

A. Well, William V. Manill was one who stayed pretty nearly all the while.

Q. Give me the names of any others you can, Mr. Dean. Do you recollect any others?

A. No; not that stayed until the war closed.

Q. Was the farm cultivated during that period, or any portion of it?

A. A portion of it.

Q. By whom?

A. By those who stayed; Mr. Henley, the agent and neighbor, moved on it and stayed.

Q. Does he live there still?

A. No, sir.

Q. Does he live in the neighborhood?

A. Yes, sir.

Q. Do you remember his first name?

A. William L. Henley.

Q. What was the date at which the occupation of the farm and that district by the confederate army ceased?

A. At the battle of Williamsburg the confederate authority ceased there; it did until McClellan's retreat; it was not under any particular authority after that—the picket lines on one side of one army, and the picket lines on the other side of the other army.

Cross-examination concluded.

Adjourned to to-morrow morning at 10 a. m., at the office of E. L. Fancher.

FEBRUARY 6TH, 1867.

Mr. KNAPP was called and cross-examined by Mr. Sullivan.

Mr. Sullivan:

Q. What was the last date, about the time the war broke out, when Mr. Bigler was down at the Bigler farm?

293 A. He was down during the winter; I don't recollect what date; probably two or three months before Virginia seceded, although the last time I know of him being there——

Q. At that time whom did he leave in charge of the farm and mills?

A. He left a man by the name of Evans and a man by the name of Southwell.

Q. Do you know that he left them as his authorized agents?

A. I only know that they were attending to his business; I don't know that they were his authorized agents.

Q. Did you ever hear Mr. Bigler at that time say so about them?

A. I don't know that I did.

Q. How long after that visit of Mr. Bigler did Mr. Evans and Mr. Southwell remain on the farm?

A. They left there in April—about the middle of April, 1861. Mr. Bigler was down during the winter; I don't recollect the exact date.

Q. When they left in April, who took care of the farm and property, and who represented Mr. Bigler there?

A. I took the business then, when they left; I didn't take it with their consent, or Mr. Bigler's, at that time; I had been agent be-

fore for Mr. Bigler, and there were a good many men that knew me and that he owed, and they thought that they would get their pay, and they left it in my charge, and I took charge.

Q. Of everything upon the place?

A. Of everything.

Q. Had the war then commenced?

A. It had not in that section; there were no soldiers in that section at that time, I believe, although I am not certain.

Q. How soon after you took possession before that district was occupied by the insurgent armed forces, to the best of your recollection?

A. To the best of my recollection, it was not over two or three weeks, although I will not be positive; I think about the 10th of May; I will not be positive.

294 Q. How long, then, did you stay to look after this business?

A. I stayed until the confederate authorities took possession of the place.

Q. You stayed until the confederate authorities took possession of the place?

A. I transacted business for Bigler up to that time, and afterwards for them until the evacuation of the peninsula.

Q. When you say the confederate authorities, name the officers for whom you transacted business, and who took possession of the place. Who was in command?

A. The place was taken charge of under General Magruder.

Q. Do you mean to say that this was about three weeks after you first took possession of the place for Bigler?

A. It was about the 1st of June, I think, that the confederate authorities took possession.

Q. Did an armed force go and stay on the place?

A. No.

Q. Then how do you mean that it was taken possession of under General Magruder's orders?

A. An officer ordered me to stay there and hold it for him.

Q. Who was that officer?

A. It was Major Bloomfield.

Q. Who was Major Bloomfield?

A. He was chief quartermaster on the peninsula in Magruder's army.

Q. Where is Major Bloomfield now?

A. I have not the least idea.

Q. Was he at that time acting as quartermaster of General Magruder's confederate army?

A. Yes.

Q. Was General Magruder in possession of that entire district?

A. Yes, sir.

Q. Had there been any battle fought between the United States forces and confederate forces at that time?

A. Not up to the time of his taking possession of it?

295 Q. But the war was in existence, and there were the two armies arrayed against each other on different lines, were there?

A. Yes.

Q. Was the order that you referred to served upon you in writing?

A. No, sir.

Q. Was it served upon you by one of Major Bloomfield's staff, or clerks, or officers?

A. Gen. Magruder appointed me personally to take charge of the

mills under Major Bloomfield; Major Bloomfield directed me then what to do with it, and how to manage it.

Q. How did you receive the notice of this appointment by Gen. Magruder?

A. I went down to Yorktown, and saw him.

Q. What about?

A. I had received instructions from Mr. Bigler to stop the mill, and went and told Gen. Magruder I could not run the mill any longer unless he gave me authority to do it; they were in the meantime getting lumber.

Q. You saw him in person, did you?

A. Yes, sir.

Q. How far was his headquarters at that time from Bigler's Mills?

A. About ten miles.

Q. Further down the peninsula?

A. At Yorktown.

Q. What did Gen. Magruder tell you in reply to your question?

A. He told me he would take possession of the mills, and fixed my pay to run them, and told me to go to Major Bloomfield for orders.

Q. Did you get your orders then from Bloomfield, in accordance with Gen. Magruder's directions?

A. Yes, sir.

Q. Was Mr. Waller present at either of those interviews between you and Gen. Magruder, or between you and Major Bloomfield?

A. No, sir.

296 Q. You went to Gen. Magruder's headquarters on this business on your own judgment and of your own accord, did you?

A. Principally; I asked the advice of other parties; they thought, perhaps, Mr. Bigler might come on me for damages if I continued to run the mill after he ordered me to shut it down.

Q. Well, how long did you stay there acting under Gen. Magruder's orders?

A. I stayed there until the evacuation of the peninsula by Johnston—Jo. Johnston—with the confederate armies; but during that time I had my leg broken, and was unable to attend to any active duty, and other parties ran it instead of myself.

Q. How long was it before the confederate armies evacuated the peninsula as you state?

A. It was nearly a year; they evacuated about the first of May.

Q. Of the next year? During that time you were then under his orders?

A. Yes, sir.

Q. Did you ever receive any orders with reference to this place, or the Bigler property, during that year, from any other authority or any other person than those you have named?

A. None with the exception of the engineer department; they would send orders for lumber frequently, and I would send it down to them.

Q. You mean the engineer department of the confederate army?

A. Yes; the force that was at Yorktown.

Q. After the evacuation of the peninsula by Gen. Johnston's army, how long did you then remain on the farm?

A. I remained until after McClellan's retreat down the peninsula from before Richmond—at my home which is a mile from the mills.

Q. During the time that the peninsula was under the control of Gen. McClellan's Army, who managed or superintended the Bigler farm and property?

A. It had no manager or superintendent that I am aware of.
297 Q. Did Gen. McClellan's forces occupy it?
A. There were a few men occupied it; they landed provisions there, and a few men occupied it to receive those provisions; it was not strictly in the possession of the Union Army.
Q. Did they not take possession of the dock and other property for the military purposes of the Army?
A. Yes; they would use a portion of it. They took military possession of whatever was necessary.
Q. Did they remain in military possession of that as long as army purposes required it—as long as the Army stayed in that district?
A. Yes, sir; or rather until after McClellan's retreat through Williamsburgh.
Q. After Gen. McClellan's retreat, and the abandonment of his military possession of a portion of this Bigler property, as you have stated, did the military commandant of the confederate forces again take possession?
A. No, sir.
Q. Did the confederate armies again have control over that portion of the district?
A. No, sir; there were frequent raids and scouting parties down there, but they never held possession of that portion of it during the whole war—with the exception of Wise's raid.
Q. How much of the period for the rest of the war did you remain there at the farm, or in its vicinity; pretty nearly all?
A. I remained in that vicinity nearly all the of the time; I was in the service, and scouted down there pretty frequently.
Q. You were in the service; in which army?
A. In the confederate army.
Q. In what command were you?
A. I was in the provost marshal's department; a portion of the time in what was known as the secret service.
Q. What was your company, and who was your commander?
A. I had neither company nor commander.
Q. Who was the provost marshal under whom you were?
298 A. His name was J. H. Carrington.
Q. Now an attorney in Richmond?
A. Yes, sir.
Q. Did you remain in that service until the close of the war?
A. Yes, sir.
Q. Your true position then was that you were in the secret service. You did not have to do any field duty?
A. No, sir.
Q. Were you in regular enrolment in the provost's command—on the confederate rolls?
A. Yes, sir.
Q. Situated where you were in that part of the peninsula, your chief business was to get information; was it not?
A. Yes, sir.
Q. I mean information for your command—your confederate command?
A. Yes, sir.
Q. With regard to the position and movements of the United States Army?
A. Yes, sir.
Q. Did you get your pay in confederate money for that service?

A. Yes, sir.
Q. You continued in that service until the close of the war?
A. Yes, sir.
Q. When Gen. Johnston's army withdrew up the peninsula, how far up above the Bigler Mills were his new military lines established?
A. It must have been forty or fifty miles.
Q. Yours was not a duty that required a uniform?
A. No, sir.
Q. But just an ordinary citizen's clothes?
A. Yes, sir.
Q. How soon were the Union lines moved up beyond you towards Gen. Johnson's military lines—immediately after his retreat?
A. Yes, sir; McClellan's Army followed him directly up to the line before Richmond.
299 Q. Well, you didn't go up with Gen. Johnson's army? You still remained on the Bigler farm?
A. Yes; my leg was not well enough for me to go and be of any service.
Q. But, after your leg got well, how would you go backwards and forwards from the Bigler farm up to the confederate military lines?
A. I generally went by the river as far as White House?
Q. Did you go on a boat?
A. Yes; a small sail-boat.
Q. But you would have to watch your chances so as to avoid the military observation of the Union forces?
A. Yes, sir.
Q. You say you usually went by boat; but when you went by land, how would you go so as to avoid the Union military posts; on foot or on horseback?
A. Sometimes on foot, sometimes on horseback; but there was no regular army from that point after McClellan's retreat.
Q. Sometimes there was?
A. Yes, sometimes. When Grant was on the peninsula was the longest time when there was a Union Army established between us and Richmond.
Q. During the time when the Union Armies were between you and the confederate military lines, did you, in your trips to and fro, succeed in avoiding them, or were you ever taken prisoner?
A. I never was taken prisoner. When they were on the land, I would go over to Gloucester, and go back to Richmond.
Q. When they were on the water, you went in another way?
A. Yes, sir.
Q. During all that time did you have to give any supervision to, or attendance to, any matters about Mr. Bigler's farm or property?
A. No, sir.
Q. Did anybody?
A. No, sir.
Q. Was it left alone and abandoned by everybody and to any-
300 body, or were there tenants on it who occupied it?
A. There were tenants on it who occupied portions of it.
Q. Did the occupation include the buildings on the greater portion of it?
A. No, sir; but on a considerable part of it.
Q. What do you mean by saying that Mr. Bigler made an assignment in 1859?
A. He made an assignment of his property there to an assignee for the benefit of his creditors.

Q. How long did that assignee keep possession?

A. A very short time. The place was put up and sold at auction by the assignee.

Q. Who bought it?

A. Simon Bigler.

Q. Did the quartermaster of General Magruder's army give you any vouchers or receipts for lumber, or for any other thing from the farm?

A. Not after they took possession of it.

Q. They never gave you any receipts for anything turned over?

A. No, sir.

Q. Didn't you keep the orders that they gave you?

A. No, sir.

Q. Didn't you take receipts for what you turned over?

A. The property was turned over to the quartermaster's department, to a man named Stubbs, who was agent for the quartermaster's department. I took receipts from Stubbs for the personal property on the place. It was taken possession of by Stubbs as confiscated property, he being the confederate agent to take possession of such property. And what the quartermaster needed the agent of the quartermaster turned over to him, and I took his receipts for it.

Q. He gave you his receipts as agent for the Confederate States government for taking possession of confiscated property? Did you take his public official receipt? Did he give you his receipt as a public official?

A. Yes, sir; as an agent for the receiver. Briggs was the receiver appointed by the government. Stubbs was his assistant.

301 Q. So that, before the military government took possession, all the personal property had been seized by the officers of the Confederate States government as confiscated property?

A. Not before they took possession of the mill. It was after they took possession of the saw-mill on the premises.

Q. What did you do with these receipts that you got from Stubbs? Did you turn them over to Bigler?

A. No, sir. I may have the receipts yet, but I am not sure.

Q. Will you look among your effects at home and send them here to be attached to this deposition?

A. I will if I can find them. I am not sure whether I have them or not.

Q. Are you personally acquainted with Mr. Waller except by sight?

A. Yes, sir.

Q. Who is the Mr. Saunders that you refer to in your previous deposition?

A. Robert Saunders, of Williamsburgh.

Q. Was he the person who claimed, as trustee under the deed of trust, to make the sale of the farm that you refer to?

A. Yes, sir.

Q. Did he so announce at the time that he offered to sell it under a trust deed and as trustee? Did he so tell the people at the sale?

A. My impression is that he did. That is the best of my recollection. I think he announced it at the sale that he sold it as trustee under the deed of trust.

Q. Do you remember to have heard Mr. Waller say that the object was to try and protect the place, and save it from destruction?

A. I don't recollect ever of having heard him say so.

Q. Don't you think that you have heard something to that effect from him?

A. I have other parties say that at that time. I don't know but that I heard him say that his object was to protect the property and save it from destruction.

Q. Was the sale conducted in a regular way, as sales under trust deeds are usually conducted in Virginia?

302 A. As far as I know, it was. I am not acquainted with the usual made; but as far as I know, it was.

Q. About how many people were there at the sale—a dozen?

A. There were more than that.

Q. About thirty or forty?

A. Yes, sir.

Q. Farmers of the neighborhood?

A. Gentlemen and farmers of the neighborhood, and men from Williamsburgh.

Q. Did they just come down there the day of the sale and stay a few hours, and then disperse?

A. Yes, sir.

Q. Did Mr. Waller go there with the others?

A. Yes, sir.

Q. When did you hear Mr. Waller say anything about his being connected with the confederate authorities?

A. I think it was in 1864—some time during the winter of 1864.

Q. At the time that Gen. Johnston's army retreated from the peninsula, as you have stated, Mr. Waller was not in the confederate service?

A. Not that I am aware.

Q. Don't you know that he was not?

A. I don't know positively. Mr. Waller didn't live in that section of country. He lived at Lynchburgh.

Q. So far as you know, Mr. Waller was never in any millitary service down in Virginia?

A. I don't think he was. If he had been, I would have been apt to have known it, I being in the service also, and knowing him.

Q. Does what you have stated here as to Mr. Waller's not being in the service cover the period when the dock was burned, and the rest of Mr. Bigler's property destroyed?

A. Yes, sir.

Q. At the time that the mill was burned and the rest of the property destroyed, to the best of your knowledge, was not Mr. Waller in another portion of the State?

A. I don't think he was in that section. I don't reccollect seeing him there at that time.

303 Q. You think, from your acquaintance with him, and with the people of the section, and your position in the service, that you would have known of his being in that portion of the State in that period if he had been there?

A. Yes, sir.

Q. At the time the mill and the other property were burned, as you have stated it, by confederate cavalry under Col. Duke, was General Johnston's army on the retreat?

A. Yes, sir.

Q. From down the peninsula up to new military lines above?

A. Yes, sir.

Q. Was the confederate army retreating by and through this farm at the time?

A. No, sir.

Q. Had they gone already past it?

A. They didn't pass near there at all.

Q. Were not those cavalry part of that retreat?

A. There was a good deal of government corn at the mill, and they were sent there to destroy that corn, and to prevent it from falling into General McClellan's army's hands.

Q. Were the men who set fire to the property in confederate uniform or under military command at the time?

A. I didn't see them set fire to the property, but they were at the place, and took charge of the mill and corn for two or three days before it was burned.

Q. So far as you understood, it was set fire to by military order? It was set fire to the morning after the battle at Williamsburgh, and, as I understand it, by military authority and order, and by soldiers?

A. Yes, sir.

Q. Do you mean by the regular, enlisted soldiers in the Confederate States army?

A. Yes, sir.

Q. Was that the fact with regard to all of the property that was burned there?

A. Yes, sir.

304 Q. Including the dock?

A. Yes, sir.

Q. Where did that conversation that you refer to be'ween you and Mr. Waller take place?

A. In Richmond.

Q. Did you go to see him or did he call to see you?

A. I met him on the street.

Q. At that time in whose possession and control was the district where the Bigler farm is?

A. It was neutral ground; no person held military possession of it.

Q. State what you asked him with reference to the property there. Did you tell me that there was an engine there?

A. Yes, sir; I asked him permission to move the old iron from the old mill, and told him that I would move the old boiler and engine up to the White House.

Q. What to do with it there?

A. To deliver it to him there.

Q. Why did you make this offer to him; because he had purchased at the sale referred to, and you regarded him as the owner at that time?

A. Yes, sir;

Q. Did you tell him so—that that was the reason you asked—that you regarded him as legal owner.

A. I don't think I told him; I took it as a matter of course that he was the legal owner of the place.

Q. You made the proposition to remove it there for him, and not he to you?

A. I don't recollect positively.

Q. You think you made the proposition?

A. I think that I must have had some impression that he wished the mill moved there, but I don't know exactly; I know that I wanted to remove the old iron. I was down there in the secret service, and I wanted to act as not being in the government employ; I wanted an excuse to go to Richmond without being suspected of being an agent of the government.

Q. So your going up and speaking to him about the iron and the

machinery, was only to be a protection under which to get backwards and forwards?

305 A. And to make money by it; but I was permitted by the provost marshal's department to do these things, so that I might have the appearance of being a citizen.

Q. Don't you know that from the time of the confederate army's withdrawing from that neighborhood, the neighborhood of the Bigler farm, that Mr. Waller never was down there in possession of the property, of his old farm.

A. Yes.

Q. Did you in fact move this engine and boiler over to the White House?

A. No, sir.

Q. And he never said anything more to you about it?

A. No, sir.

Q. And that little conversation, whatever it was, about the old iron and the mill, is all that you have heard him say during that period as that he owned or claimed a right to remove anything off the farm?

A. Yes, sir.

Q. How long did that man Kellum stay there on the farm?

A. He never stayed on the farm.

Q. Who was he?

A. He was a farmer on an adjoining farm; he still lives in that section.

Q. You say Kellum never really occupied or managed the farm or property. Did he have anything to do with it.

A. No, sir; I never saw him do anything to the farm.

Q. You never saw him do anything about the farm, or act as if he had any control of it at all? The home guard that you have spoken of; was it a voluntary association from Williamsburgh, or was it a confederate home guard?

A. It was composed of the citizens of the vicinity who met at Williamsburgh for drill.

Q. You belonged to that home guard yourself?

A. Yes, sir.

Q. State whether what was said by this so-called home guard to the tenants at Bigler's farm was a threat that anything would be done to them if they stayed?

306 A. I didn't hear any such threat; I know it was not given by those who controlled the party.

Q. What did those who controlled the guard say?

A. They advised the agent there that those who sympathised with the North and wished to go north, had better go north then, while there was an *a*pportunity.

Cross-examination closed.

FEBRUARY 7TH, 1867.

JAMES BIGLER, sworn on behalf of defendant.

Mr. Fancher:

Q. Are you the defendant in this suit?

A. Yes, sir.

Q. Where do you reside?

A. In Newburgh, New York.

Q. Are you about to leave the city?

A. It is my intention to leave on Saturday.

Q. For what place?
A. For Europe.
Q. To remain permantly, or to return?
A. To return within four months.
Q. Did you at any time, and if so, when, contract for the purchase of a place and wharf in Virginia, called Ripon Hall, afterwards called Bigler's?
A. I did really make a purchase of the property.
Q. When, and from whom?
A. The contract was dated in April, 1853.
Q. Is that the contract?
A. It is a copy of the contract.
Q. In the answers, from folio three to six.
A. Yes, sir.
Q. Is that the contract which is alluded to in the complaint—which is described in the complaint in this action?
A. Yes; that is the only contract which was made; it was executed for me by F. C. Hammond, my attorney.
Q. Did you afterwards receive a deed from Waller?
A. On the tenth of May, my recollection is, that I received a deed, and paid over the money.
307 Q. Is that the deed? (showing it.)
A. That is the very deed itself; it is the original deed.
(Deed put in evidence by defendant's attorney, and marked Exhibit "B.")
Q. Was the instrument executed at the same time as the bond mentioned in the complaint?
A. It was not; more than a month before; I think one was early in April, and the other the tenth of May.
Q. At the time of the execution of the bond, was there a mortgage or trust deed made to any one; and if so, to whom?
A. There was a trust deed made to Robert Saunders.
Q. By whom?
A. By myself.

By Mr. Sullivan:

Q. The bond was made one month after the contract?
A. No; the trust deed was made, and the bond when I went down to pay the money.

Mr. Sullivan:

Q. The contract was a month before the other papers?
A. Yes, sir.

Re-direct:

Q. Did your wife join in that trust deed to Saunders?
A. Yes, sir; I believe so.
Q. Were you present when it was delivered to Saunders?
A. I think it was sent by mail to Waller; I am not positive whether that is so, but it is my recollection; I brought the trust deed home to have my wife execute it; she was not in Virginia at the time.
(A copy of the trust deed was put in evidence by defendant's counsel, and marked "Exhibit "C," an exemplified copy from the record, however, to be substituted for said copy as soon as obtained from Virginia.)
308 Q. Now, Mr. Bigler, after receiving a deed of this place, did you improve in any way; and if so, how?

A. Immediately upon taking possession of the place, paying the money, and getting a deed, I commenced immediately to make improvements in the place; I built, in the first place, one double house and some dwellings, and went on then to construct a mill, and to grade the land, and to build a dock for the mill; and soon after the mill was done, I commenced building some other buildings—I believe in all more than fifteen or twenty buildings; I spent on the public in buildings and improvements over one hundred and twenty-five thousand dollars.

Q. How long did you and your agents continue to have possession of the place?

A. Up to the nineteenth of April, 1861, I think it was; it was about that time; I think it was the exact day when my agents were driven away from there; it might be a day later or earlier, but I think it is about the time.

Q. How long a time elapsed from that 19th of April, 1861, till you received the possession of the place?

A. Not till the middle of May, 1865; I went down there, and went to the commanding general, who was Gen. Ludlow, and told him I had come there to get possession of the place; and after a short conversation with me, asking me who I was, and where I came from, he gave me military possession of the place.

Q. Who had the possession when Gen. Ludlow gave you that possession?

A. I met Mr. Waller, the plaintiff, on the corner, just as I was going to Gen. Ludlow's; I told him I would be back in a few minutes, and would talk with him; when I returned I told him I had gone to Gen. Ludlow's on that day, in reference to that place; he said the place was his, and that he had bought in the place, and that it had been legally done, according to the laws of Virginia, and he would hold the place; I told him he had not conformed to the contract, and that the contract expressly stated that he should advertise the sale in Richmond, and in the New York papers for sixty days before the
309 sale; I told him that Gen. Ludlow had given me possession of the place; he said that he would contest it.

Q. Do you know, or did you hear him say anything about his agents or hands being on the place?

A. I don't think he did say; he said that he had written a letter about me, and sent it down to Mr. Henly, who was then living on the place, and he wanted me to see that letter before I left the place.

Q. What time in 1865 did you say that was?

A. In May; about the 15th; about the middle of May.

Mr. Sullivan:

Q. In 1865?

A. Yes, sir.

Redirect:

Q. Did you receive any proceeds from the place, either as rent, or otherwise, from April, 1861, up to this time, in May, 1865?

A. No, sir; I never saw the place from 1861, till I went there in 1865.

Q. After you had made the contract of purchase did 'ou at any time, and when, make any sales of portions, or attempt to make sales of portions of the place?

A. In the spring of 1854; during that winter—the winter after we commenced making improvements, there were several oystermen wanted to [illegible] A Captain Sterling came to me and wished to purchase

a place, and Captain Johnson—and there were several others whose names I don't now remember—wanted to buy places, and I was desirous of selling them to them; I think in the spring—it may have been as late as the first of June: I am not positive as to the time after I had commenced making those improvements, but then I think we had the mill about running—I wrote to Mr. Waller, and, by appointment, met him at Williamsburgh; I went to him and asked him if he would release, according to contract, portions of the land, that I wanted
310 to sell very much to my advantage for large prices; I said I would be willing to pay him the whole or any part of the money if he would release those plots from the deed of trust, according to the terms of the contract. He told me he would not do it, and said he didn't want the place cut up; he didn't want it divided into small parcels. I told him it would interfere with my interest not to sell those places; that it was one of the main points in my purchase, in getting people settled on it, and getting business started there; I had been to a large expense in building this mill and other improvements, and that would establish a village there, and unless I was permitted, as the contract contemplated, selling those places, it would very much embarrass the growth of the place, and the prosperity of it. I had two or three conversations with him, and I told him that I was very much surprised at his course; that I had always taken him for a gentleman, and I was astonished that he would now go back of his own word. He immediately flew in a passion, damned me, and said if I didn't leave him he would shoot me. I told him that I would like to see Mr. Saunders, and I would like to have this matter settled, because if I were deprived of selling portions of the place it would be a great loss to me. He said he would meet me the next day at Mr. Saunders's. I mentioned to him the prices of the places I wanted to sell, an acre; the prices I was going to get for them. I was then negotiating with Captain Sterling and Captain Johnson. They were to pay me at the rate of three hundred dollars an acre; but, by appointment the next day, I met him at Mr. Saunders, and then I read the contract over, and Mr. Saunders said he should do nothing unless Mr. Waller directed him to. Mr. Waller said he would do nothing about it; he said that, as to having the place cut up, he should not have it.

Q. Did your contract and your proposed sale to Captain Johnson and and Captain Sterling succeed?

A. They said they would have nothing to do with the place if I could not release it.

Q. Release it from what?

A. From this deed of trust.

Q. Were there any other negotiations of sale that fell through for that reason?

311 A. Mr. Mat. Waller, cousin of William Waller, who owned the adjoining farm, wished to purchase—I think it was about two years after this—from six hundred to one thousand acres. We looked over the ground, and he decided that he would take six hundred acres. If he took the six hundred acres he was to pay me thirty dollars an acre, and if he took one thousand acres he would pay me twenty dollars an acre. I think there were two thousand acres in the place. 2,475 is the exact quantity.

Q. Did that contract fall through with Mat. Waller?

A. It fell through on account of his cousin, the plaintiff, advising him not to have anything to do with it. Mat. Waller told me so at the time. That was the ground of his objection.

(Mr. Sullivan objected to the witness telling what Mat. Waller told him unless the plaintiff were present.)

Q. Did Mat. Waller assign any reason to you for not completing the purchase; and if so, what? Tell what he said.

A. His cousin said the plaintiff told him that he would get the place back; that the title would not be good; that I would fail to pay, and that, accordingly, he would not have it—and so he would not buy of me.

Q. Were these portions which these several parties wished to purchase of you improved or unimproved?

A. They were unimproved—they were unimproved land. They were unimproved with regard to any buildings.

Q. What was the difference in price between the cost to you of the land and what they offered to give?

A. Well, what Sterling and Johnson wanted to buy of me I was to receive three hundred dollars an acre, and what I gave for it was twelve dollars an acre.

Q. Did those sales all fall through?

A. Yes; they all fell through.

Q. Mr. Bigler, to go back a little, did you have any conversation at any time with the plaintiff, other than that you have already stated, in relation to this property; if so, when and where?

312 A. I had a conversation in Mr. Sullivan's office about the time of the commencement of this suit. I had a conversation with Mr. Waller. He then claimed that he had legally purchased the place and held and would hold it.

Q. What did he say on that subject?

A. He said that he had foreclosed the deed of trust, and had had the place sold under it, and he had made the purchase according to the laws of Virginia, and declared that the title was good and he would hold the place, and should contest any claim that I might bring against him unless I would pay him the principal and interest and all the amount that he claimed to be due. On these terms he said he would relinquish his claim. That he claimed should be paid in gold. I then told him he was one of the rioters who despoiled me of my proporty; had driven my men away; had had possession of the place; had burned my mill and despoiled me of my property and I wanted a consideration for that. I thought it was a fair offset against his claim. He replied that he had been one of the rebels, and he gloried in it, and that if he had a chance he would do the same thing over again. He said "You know we were game; Virginia died hard, and," said he, "I am only sorry I have not got a chance to do it over again." I said those being his sentiments there was no use of us trying to settle. He has always claimed that he would take nothing but gold for this place. I have had several letters from him on that subject.

Q. Was anything said in this conversation in respect to the possession of the place after the sale under the trust deed?

A. He said he took possession of it and had retained it. That is, up to this time that I had got military possession, which was in May, 1865, and that he said he should contest.

Q. What was the value of that mill that was burned?

A. The mill cost twenty thousand dollars; the mill and grading about the place preparing for it cost fully thirty thousand dollars, the whole thing.

Q. What was the value of the dock that was burned?

313 A. There were about a million and a half feet of lumber in the dock besides the piles. It is impossible to say what it cost. The

lumber that was in it cost about ten thousand dollars. It was over two thousand feet long. I think that it was twenty-two hundred feet in length.

Q. Did you go to the place on that occasion, in May, 1865, when General Ludlow gave you permission to take possession?

A. I did and saw the ruins of the mill and dock, and some of the buildings and fences.

Q. Well, I ask you what other ruins or damage appeared at that time besides the damage to the mill and wharf?

A. One of the houses near to Williamsburgh was pretty nearly torn down. The mill was burned and a portion of the dock was burned. The mill was a total wreck.

Q. How much damage was done to the dock?

A. I didn't make any calculation as to the damage, what it was.

Q. How much was the house injured?

A. The house was very much injured. The side was taken out and the barn adjoining the side was taken off.

Q. Can you state the damage to the dock and houses?

A. I think the damage to the house the largest, and I think the loss must have been from three to five thousand dollars.

Q. And the damage to the mill was a total loss.

A. A total loss. Yes, sir.

Q. Did you discover any other damage there; to peach trees?

A. The peach trees were very much injured. I have spent in putting them in order since then about fifteen hundred dollars to repair the damage that was done them at that time.

. Did you include in that the crop?

Q. I included what I have paid for taking care of the trees.

Mr. Sullivan:

Q. For losses also?

A. Yes, sir.

314 Re-direct:

Q. Was any personal property of yours taken away from the place?

A. When my men were driven away from the place I had a store filled with goods; I had horses and mules with waggons, farming utensils, and all the paraphe'nalia for working several farms; when I came down afterwards in May, 1865, I could not find any thing of it at all, except part of threshing machine, and I believe a portion of a mower for mowing hay and grain—a reaper, I believe, they call it.

Q. What was the loss on account of them?

A. A good many thousand dollars; it is very hard for me to tell; there was a large amount of lumber; there was a large amount of logs drawn to the mill to be sawn; some of them were still there but decayed, others were gone to be worked up; I could not tell what amount was lost; it was a good many thousand dollars.

Q. Twenty-five; fifteen; ten?

A. I should think it was very safe to say ten thousand dollars.

Q. Bigler, did you ever receive any notice of the sale of this place under the trust deed at that time?

A. Never heard from it at all until long after it was done.

Q. To your knowledge or belief, was there ever any notice inserted in any New York paper on the subject?

A. I never saw any; I never heard of any.

Q. State the quantity that those men wanted to purchase.

A. Capt. John Sterling, some two acres; well, I think three or four acres each would cover what they really wanted; merely places.

Q. Was there any application by oystermen there?

A. There were quite a number of applications there; they told me that as it stood if Capt. Sterling would buy and was satisfied with the title, they were satisfied with the title, but if he didn't they were not; but the whole thing fell through.

Q. How many other applications did you have?

315 A. About half a dozen others.

Q. How much did they want?

A. They all wanted similar lots, about two or three acres each.

Cross-examined by Mr. Sullivan:

Q. Who was Mr. F. C. Hammond, whom you speak of as your attorney?

A. Mr. F. C. Hammond was a school teacher, a cousin of my wife's, who induced me to make this purchase of Mr. Waller; he induced me to make the purchase of this place down near Williamsburgh.

Q. Where is he now?

A. I don't know; I suppose he lives down there now; I have letters from him there, in fact, so I know he still claims to live in that region.

Q. In Williamsburgh?

A. Yes, sir.

Q. Was he your authorized agent to make that contract that you refer to in your answer?

A. He was; yes, sir.

Q. When did you last see the original of that contract?

A. I really can't tell you; my impression is that Mr. Fancher had it in his office when his office was burned.

Q. But you are not certain.

A. No, sir; I am not positive; I have no knowledge of seeing it since.

Q. Was the contract referred to the only paper that was executed at the date of the contract between you and the plaintiff; was there any other paper passed at the time that this was passed?

A. No, sir; it was sent to me for my approval, and I wrote to Mr. Waller to say it was satisfactory.

Q. You wrote to Mr. Waller.

A. Yes, sir.

Q. Did you mail the letter to him, to his address?

A. Yes, sir; I think I had his reply at the time with Mr. Fancher's papers.

Q. You think you have what?

A. I had his answer and it was put with Mr. Fancher's papers, and I suppose burned with the others.

316 Q. What is the entire amount of money on account of that purchase that you have paid to Mr. Waller?

A. Seventeen thousand dollars and interest.

Q. Interest on the seventeen thousand dollars; the interest on the whole debt?

A. From time to time as the payments arrived.

Q. Up to what time do you claim that you paid all that was due on the contract?

A. The tenth day of May, 1861; all before that.

Q. You claim to have fully discharged?

A. All before that I have his receipts for. There was no payment past due that was not paid when the war broke out.

A. As to the residue, do you claim to have any payment, receipt, or release, other than that in the nature of the offset set up in your answer?

A. Not that I am aware of. I would say in connection with that, that I don't know what there is in the answer as offsets; so I am speaking rather in the dark.

Q. Did you not swear to the answer?

A. Yes, sir; I did some time ago.

Q. What was the last day before the war, when you were at the Bigler farm?

A. It was either in February or March, but I can't tell now which; I could tell if I was home; it strikes me it was in February, in 1861; it was a very short time, any way, before that.

Q. You have spoken of your agents having been driven from the farm. Upon that subject, do you know anything except from report or hearsay?

A. Well, I will explain that.

Q. You don't know so yourself?

A. All I know is from report from my agents. I was not there at the time; they came in my vessel which was there at the time.

Q. When you speak of your agents having come on, give the names of the individuals whom you mean by your agents?

A. George Southwell, who had charge of the store and finances of the place, and William Evans, who had charge of the mill and the out-doors property.

317 Q. What, if anything, did they bring away of your property from the farm, when they came?

A. I am not aware that they brought away any of my property; they brought their own household property. If they brought any of my property, it was unknown to me.

Q. Having learned that this agent named by you had left, whom did you then direct to take charge of the property, if you did any one?

A. My impression is that I did'nt direct anybody, but I may have written to Mr. Knapp. They left the place in charge of Mr. Knapp, they told me.

Q. Have you any memorandum or copy of the letter you wrote to Mr. Knapp at that time?

A. I have not. I may have at home, but I have no recollection of having it; I copy my letters generally.

Q. From that date, that is the date of the letter to Mr. Knapp, until the *the* date of yours referred to as occurring in 1865, did you go to the farm; did you send any one there to look after it for you, or did you write to any one else to look after your property?

A. I did not go there; I started to go, but could not get beyond Fortress Monroe. I didn't send any one, nor did I write to any one to ask him to take charge.

Q. During that period, did you communicate with anybody from the farm, to learn what its condition was?

A. I frequently heard from there, from soldiers and others.

Q. What was the date of your visit as far as Fortress Monroe?

A. I think it was in 1862.

Q. At that time, in whose governmental military occupation was the district in which this farm is situated?

A. I understood at the time it was in the rebel lines. I have no personal knowledge. I don't know who was in charge.

Q. You mean their military lines?

A. Yes, sir; I learned at Fortress Monroe it would not be safe for me to go there, and so I didn't go.

Q. And the reason why it would not be safe, was because it was within the rebel military lines, was it not?

318 A. Yes, sir.

Q. Who was present besides Mr. Waller and yourself, at the time of the conversation in Williamsburgh that you refer to?

A. My clerk then was George H. Southard, who was with me there; he was present at the conversation. I don't know that there was anybody else.

Q. Where did the conversation take place; on the street?

A. Yes, sir; right on the corner, straight out from Mr. Waller's house I don't know what street they call that; it is almost the only street there is in Williamsburgh. When I first met him, Mr. Paige was with him. I didn't stop then and talk with him; I told him, if he would wait till I came back.

Q. When he told you that he bid in the farm at the sale under the trust deed that you referred to, did you tell him that you recognised that as a valid sale, or that you did not?

A. I told him that he hadn't done it according to the terms of the contract, as I understood it.

Q. How?

A. I told him that I thought the thing was not done right; it was not according to law.

Q. And that is all you said?

A. I told him that I didn't think it was done right; I told him that it was not done according to the laws of Virginia; I told him that we know that Virginia had no laws.

Q. Did you tell him that you recognised his title, or did you tell him that you did not?

A. I didn't say it in that language at all. I told him that I didn't understand him to have done it according to the terms of the contract; I said I was willing to let the Supreme Court settle the matter.

Q. When he told you, as you stated, that he had been in the rebel service, did he tell you in what position or character?

A. Nothing further than that he was an officer.

Q. Whether in the civil or military service?

A. In the military service; I don't think he mentioned the title at all.

319 Q. Did he tell you in what period, or in what locality?

A. I don't think he revealed a thing—number, time, or place.

Q. Has he never told you, in any of the interviews, that he was not in the service at the time of the destruction of your property, and never was in the service in that district?

A. He wrote to me that, but he never told me that, that I remember of; that is, he wrote me something about that substance.

Q. When you got possession under Gen. Ludlow's orders, who did you find occupying?

A. Well, I should think a dozen different ones; quite a number of strangers to me—some of them.

Q. Squatters?

A. I don't know whether they were squatters or not.

Q. From that date, until what period did you continue in occupation and possession of the farm?

A. I think till about the first of July last, when I sold the place.

Q. That was a little over a year?

A. Yes.

Q. What kind of an order did you take from Gen. Ludlow; an order signed by him as military commandant?

A. I think it was a printed order that referred to all abandoned property; it was not signed. His name was printed as a general commander of the Department; he gave it to me, and told me that would protect me; and if any one interfered with me to notify him, and he would see to it.

Q. What have you done with it?

A. That is more than I can tell you.

Q. In order to obtain that order from Gen. Ludlow, did you make any statement to Gen. Ludlow, or any his clerks, and where?

A. I made a written request to Gen. Ludlow, that he would put me in possession of the place. He required that.

Q. Have you a copy of that request?

A. I have not.

320 Q. Was it an oath?

A. No, sir. Possibly my clerk has a copy of it at Newburgh.

Q. If he has will you produce it?

A. I have no objection. I don't know that he has.

Q. In that statement to Gen. Ludlow, did you specify the property of which you wanted possession, and did you state the individual whom you wish to have evicted?

A. No, sir; there was nothing said about that. I only said that I had been dispossessed of the place, and that I now wanted to get possession of it again.

Q. This order had his name appended to it, with his military title?

A. Yes, sir; brigadier general I think it was.

Q. When you went to the farm with that order, did you go alone, or did any military force go with you?

A. No military went with me.

Q. Did you show that order, or speak of having that order to the persons whom you found on the farm?

A. Yes, sir.

Q. Did you, by authority of that order, command them to leave?

A. I think I told them something like this. They had good crops on the land—some of them. I was willing they should go on and work there.

Q. You required them to leave or attend to you?

A. Yes, sir.

Q. Did they all accede to that?

A. Yes, sir; they seemed to be willing to; they did.

Q. From that date till the time you sold the farm, did you ever see the plaintiff on the farm?

A. No, sir.

Q. During the interval of your occupancy, whatever lumber or crops were taken from the farm were for your account, were they?

A. I believe so.

Q. Did you get your mill in operation again?

A. I never rebuilt it. With regard to the previous question as to whether I received it, some of them didn't pay; they refused to pay. I only received what did pay; it was rather a small amount in all.

321 Q. Have you a copy of the bond and of the trust deed which you gave?

A. Only those which we have in evidence here.

Q. Were you present, and did you receive in person that deed from Mr. Waller—this Exhibit "B?"

A. I did; yes, sir.

Q. At what place was it executed and delivered?

A. At Williamsburgh.

Q. Who was present when the deed was executed and delivered, and when the bond was executed and delivered?

A. Mr. William, and a man by the name of Snow—a man who went with me in the matter; but the bond on which you commenced the suit was not executed till next day. We didn't get through with the matter all we wanted on the first day. I paid him the money, and he gave me a deed on the first day.

Q. Did you see the letter which Mr. Waller said he had written to Mr. Henley, which you referred to in your conversation?

A. I didn't see it; I saw it in his hand. I didn't read it; I never had possession of it at all.

Q. Do you know that at any time during the period of your absence from the farm, as related by you, any of the lumber that was taken from the farm was paid for by the confederate government?

A. I don't know anything about it.

Q. By any one?

A. I don't know anything about it at all.

Q. Do you know that the damages that were done to the place were paid for to any one, either for your account or anybody's else?

A. No personal knowledge about it at all.

Q. When you applied to the plaintiff to give his consent to your sale of the tracts of land to Johnson, Sterling, and others, the oystermen that you have spoken of, did you not state that the tracts of land which they wished to purchase were tracts down at the water-front of the farm?

A. They were; yes, sir; I said so.

Q. Did not Mr. Waller state, in that conversation with you,
322 that he was not satisfied to consent to the sales that were exclusively appropriating the water-front of the farm, which in pecuniary value was much greater in proportion than the same area anywhere else, or words to that effect?

A. He stated to me that the lots on the river front were worth more, and in the event of his taking the place back, he didn't want to have a dozen places taken off from the water-front, and he wouldn't have them.

Q. What conversation, if any, did you and he hold with reference to his taking the place back? Was there any conversation of that kind?

A. No, sir. I told him that I was abundantly able to pay for the place, and could make my payments if I lost the whole of it.

Q. Did he not give as a reason for not consenting to do what you asked, that to consent would be unduly diminishing the value of the security for the residue of the unpaid debt?

A. No, sir; I don't think that he used any such language at all.

Q. Are you as positive of that as you are with regard to any of the statements that you make with regard to what occurred in any of these conversations?

A. In connection with that, he said that he must be his own judge as to the security under the contract.

Q. And then did he not say that the remaining security would not be sufficient after taking off the water-front?

A. No, sir; he never said anything of that kind, except that he said he would be his own judge as to the securities.

Q. If he said he would be his own judge as to the securities, in what

connection could he have said that unless it was that after the water-front lots were sold off, the security would not be satisfactory, unless it was that the rest of the farm was not sufficient to secure the unpaid debt?

A. I never remember to have used the words that the security would not be satisfactory, and the remarks that I have made were not in that conversation.

Q. Did you claim, in the conversation with him, that you were to be the judge as to what effect would be had upon the security in case of selling a part of the land?

323 A. I claimed to him that there was a special contract; that I distinctly understood that I was to have the privilege of selling off from time to time those village lots. The whole thing was agreed to between us at the time the contract was made; to build a village, and have it inhabited, and sell off the lots, and it was in that connection that this article of releases was agreed to.

Q. What you have stated in your last answer refers to a conversation between you and Mr. Waller, that took place during your negotiations during the sale, and not to the written contract?

A. We talked it up at the time. He said he would be the judge, and then I said that he was violating the provisions of the contract; and then I appealed to Mr. Saunders, and Mr. Saunders said he would do nothing unless ordered by Mr. Waller. We had quite a number of conversations. It is hard for me to recollect all the conversations.

Q. Did not Mr. Waller, in those conversations, place his refusal to assent to release these tracts of land from the mortgage upon the ground that, if so released, he did not consider that the remainder of the farm would afford ample security for the liquidation of the residue of the debt for the purchase of said estate?

A. I am confident there was no such conversation.

Q. In any of the conversations between Mat. Waller and yourself, with reference to negotiations about part of this farm, was Mr. Waller, the plaintiff in this suit, present at any time?

A. I think he was, once or twice; but he was not when we went over the ground, and settled as to the quantity of land.

Q. In the conversation between you and the plaintiff in Williamsburgh, in 1865, you say he told you that he would release his claim on the farm, on you paying the balance of the purchase-money, with interest. What did you reply to that proposition and claim?

A. I think I told him I had no proposition to make.

Q. To that proposition from him, did you ever make any direct reply, saying that you would accept it or that you would not?

324 A. If he would allow me for damages done, I would settle with him.

Q. You mean by damages done, the damage done by the confederate armies to your place?

A. That was my meaning at the time.

Q. That was what you gave him to understand?

A. Yes; to that effect. I then claimed, also, that he should allow something for his violation of his contract, in refusing to consent to the sales, as I have been largely a looser by his not doing it.

Q. What you have stated in your last answer is and has always been, in substance, the only objection you have made to him to his claim?

A. I think that is about the substance of it.

Q. You state that you had several conversations with him upon that subject?

A. No; I think but two. One at your office, and one at Williamsburgh.

Q. Is the answer to the last preceding question a substantial statement of what your position in reference to Mr. Waller's claim always has been?

A. I think it is, sir.

Q. You claimed that, notwithstanding any proceeding under the mortgage deed, that you were still the owner of the farm?

A. I think so.

Q. You claim that?

A. Yes, sir; I do.

Q. You never claimed that you had in any way discharged the bond and the trust deed for the purchase-money?

A. No, sir; I never claimed that I had discharged it in any other than these assets.

Q. You have some letters from Mr. Waller, received since you took possession under Ludlow's orders, haven't you?

A. Yes, sir; several.

Q. Has he in any one of them, in substance, claimed payment of the balance of the purchase-money, and offered, upon such payment, to release the bond and trust deed and all claims and liens by reason of the sale that you have referred to?

325 (Objected to by Mr. Hayward, of defendant's counsel, and question withdrawn.)

Q. How many letters containing offers or demands from Waller have you received since the time when you took possession of the farm?

A. I can't tell you.

Q. About how many in which he has made claims, or refers to this subject; have you received ten?

A. I should think not.

Q. Have you received six?

A. I think I have; four, five, or six.

Q. You have those letters still under your control?

A. I think I have the most of them; I know I have several of them.

Q. In the conversation that you refer to as having taken place at my office between you and the plaintiff, did you say that the plaintiff made a condition of offering to release his claim in the farm, that you should pay gold?

A. He did; yes, sir.

Q. Did he not, in that conversation, merely present reasons showing that, in justice, the payment should be in gold; was not that the tenor of the conversation?

(Objected to by defendant's attorney.)

A. He argued in that way. That was a matter of argument between us.

Q. Was not that all that there was about it; that you had a long argument on the subject; that you had a long talk about it?

A. Well, we had a good deal of talk about it; he went on to tell me what he had done, and what he should substantiate and continue to do.

Q. Was not what you have now said merely argument?

A. That part of it was a mere argument.

Q. He thought that you should pay gold, and you thought you should not?

A. I didn't think I ought to pay at all; I thought that there was assets enough to bring the balance the other way; I saw perfectly

326 well, from his conversation, that there was no hope of our settling.

Q. Did you offer to settle, at that time or at any time, on any other basis than that he should make compensation for the damages that you have referred to on your estate?

(Objected to by defendant's attorney.)

A. Yes, sir; I have.

Q. State now what offer, different from that referred to in my question, you have ever made.

(Objected to by defendant's attorney.)

A. I offered to sell him the whole place for twenty thousand dollars, and close the entire negotiations. He offered me eighteen thousand.

Q. In the conversation which you have referred to between yourself and Mr. Waller, you told him, you say, that he was one of the rebel rioters; that was the phrase used?

A. I think I did, or something equivalent to that.

Q. Did you say that he was one of the individuals who had, in person, destroyed your property, or that he belonged to the general rebel army?

A. I said that he was one of the band that did it.

Q. You didn't charge him with being one of the individual actors in the destruction, or being present at your farm?

A. Not in that particular way.

Q. So far as you know, personally, did Mr. Waller receive any lumber or other articles taken from the farm during the period of your absence, or was any taken by or for the benefit of Mr. Waller, the plaintiff?

A. No; I have no personal knowledge.

Q. Did any of the men to whom you proposed to sell small tracts of land go with you to see Mr. Waller at the time you asked him to release the mortgage?

A. I don't think they did, with me.

Q. The sale that you have made of this farm last July—was
327 it made at private sale, or was made under judicial proceedings?

A. At private sale.

Q. How far has the sale of the land by you been consummated?

A. I have made a written contract of sale.

Q. Have you kept copies of the letters that you have written to Mr. Waller on the subject since 1865?

A. Those that I have written at Newburgh I have kept pressed copies of, and those that I have written at New York City I have not kept copies of.

Q. Have you delivered possession of the farm, or have you any possessory rights there at all now?

A. No, none at all; that is, I mean by that, I have no possession.

Q. You have no possessory rights?

A. No, sir.

Q. What notice has the person who has purchased of you of the existence of Mr. Waller's lien or claim to the land?

(Objected to by Mr. Hayward, for irrelevancy.)

Cross-examination concluded.

Re-direct by Mr. Hayward:

Q. What is the value of this estate, or what was the value of this estate when you took possession of it in 1865, according to your best judgment?

A. That is a hard question to answer. I sold it in July for thirty thousand dollars.

Q. That is your opinion as to its value?
A. I was satisfied if I could get that for it.
Re-direct concluded.

WILLIAM WALLER, plaintiff in this action, called by his counsel and duly sworn, testified as follows:

Q. You are the plaintiff in this case?
A. I am, sir.
Q. Where do you reside?
A. Lynchburg, in the State of Virginia.
Q. Are you personally acquainted with the defendant?
328 A. I am, sir.
Q. At what date did you sell the farm which is referred to in this action?
A. In 1853—10th of May. I think the deed was executed on the 22d of June, the same year—the trust deed.
Q. What was the consideration to be paid?
A. He paid me $30,000—paid $5,000 in cash, and gave his bond for $25,000.
Q. How much on the deferred payments has he paid you?
A. Mr. Bigler paid me regularly, principal and interest, in accordance with the contract, up to May 10th, 1860, inclusive. He then owed me $13,000, and has from the 10th of May, 1860, up to this time. The 10th of May, 1860, payment was the last payment.
Q. Have you ever, aside from this suit, demanded payment from Mr. Bigler of that balance?
A. I met Mr. Bigler in May, 1865, in Williamsburgh, after Gen. Lee's surrender to Gen. Grant. He was coming up Main street in a buggy, attended by some gentleman whose name I did not know, and whom Mr. Bigler introduced to me. I advanced, told him I was glad to see him, and hoped our matters would be settled then speedily and amicably. Mr. Bigler appeared somewhat excited, and remarked: "Well, you cannot sue me for the whole amount—you cannot sue me for the whole amount." My response was: "Mr. Bigler, I did not come here to sue you; I have merely come to ask if we cannot settle this matter." His response was: "I owe this money, sir; I acknowledge the debt. I would pay it now—I have the money at home, but I fear Congress may possibly confiscate the claim and I be called upon to pay it the second time." In consequence of this declaration of Mr. Bigler, I walked immediately acros' the street. He then proceeded to Gen. Ludlow's.
DEFENDANT'S COUNSEL: Please tell us in your examination just what was said between the parties, and not state any conclusions.
329 A. He went on to see Gen. Ludlow. I went immediately over to the office of Mr. W'm S. Peachy. Said I: "Peachy, I believe Mr. Bigler is an honest man, and intends to pay this debt, and my instructions to you, as my lawyer, are, not to sue him." Mr. Bigler left Virginia in consequence of his promise to pay me, without suit.
Q. When, if ever, did you next demand this money of Mr. Bigler?
A. That was in May, 1865, after Gen. Lee's surrender to Gen. Grant.
Q. Have you ever seen him again?
A. Yes.
Q. Just tell us what you said.
A. In consequence of what Mr. Bigler said, I recognized the fact that there was probably some plausibility in it. I waited till November following, having, in the meantime, obtained a pardon from the President of the United States. I came on to New York, believing that the dan-

ger was, in consequence of the pardon, obviated, and Mr. Bigler's difficulties removed. I was here eight or nine days. I had one interview with Mr. Bigler in Mr. Sullivan's office. Mr. Bigler then declined to pay, on the ground that I had injured him during the war; that I had been a party—one of a party—to go on his estate and injure him; that he claimed as much for the injury that I had inflicted as he owed me. Subsequently, during that conversation, he made this remark: "Well, you would not claim more than the principal, I presume? "Yes," said I, "I claim everything that I consider that you owe me."

Q. Have you anything further to say about that?

A. Nothing, except this: In his testimony I think he goes outside of the record. Political conversation between two gentlemen I don't think has much bearing upon a legal matter.

Q. After that, did you ever make any demand? If so, in what words, and at what place?

A. No further demand, sir.

Q. Except by this suit?

A. That is all, sir. I made frequent propositions for a compromise, but no further demand. I also attempted to sell under the deed.

330 Q. Have you the original deed of trust that was executed by Mr. Bigler to secure the unpaid purchase-money for the farm?

A. I have a copy, sir, not certified, in my pocket now. The certified copy is in Mr. Bigler's possession, as also in York County court. The copy which I have in my pocket I will swear is a correct copy, though not certified. The original is on file in York County court.

Q. How long before the date of that trust deed did you enter into the contract for the purchase with Mr. Bigler? Have you the original contract?

A. No, sir. I have the date of this trust deed, and by referring to that can tell. There was a paper executed in April, 1853. That paper was not the contract which subsequently was agreed upon to exist between Mr. Bigler and myself.

Q. There was a contract first, and then that was modified?

A. Yes, sir.

Q. Where is that modified contract?

A. It is in the trust deed, sir, dated—

[Q. It is embodied there?]

A. Dated 22d June, 1853—two months after and more—April 3d, 1853, and June 22d, 1853.

Q. Did it set out in full in the deed of trust?

A. Not in full, sir, but the modifications—the differences—are set out.

Q. Where is that original contract?

A. The original contract Mr. Bigler publishes in his answer. My copy of it was torn up on the spot, in consequence of the fact that the subsequent contract was drawn up, not differing but very little, indeed, from the other. This change was substituted to make it more certain: "The said Waller agrees that said Bigler shall sell such portions of land as he may see fit, provided it does not operate a serious reduction of the security afforded by the trust deed."

Q. That is in the contract as it was finally executed?

A. That was the paper between Mr. Bigler and myself.

Q. Did you examine the copy as it is set forth in the complaint

331 [answer?] in this action? Did you read it?

A. Of what?

Q. Of the contract in Bigler's answer in this case.

A. It is a correct copy of the original contract drawn up between us, dated April 3, 1853.

Q. Did you state that there was a second, different from that?

A. Yes, sir. And written by Mr. Bigler's friend, Mr. Hammond, only varying from the other, as I told you, about the payment to be made, and in that expression that I have spoken of I don't regard the difference as essential.

Q. Do I understand you that the second one was torn up—the one you had?

A. The copy of the first one was torn up.

Q. Where is the copy you had of the second one?

A. That was destroyed, sir—filed with my papers in York court, and was destroyed among other papers.

Q. Where?

A. In the removal and the burning of York court, or by Gen. Johns'on's army, when he was leaving the peninsula, but I never attached much importance to it, because the two contracts, in my estimation, did not vary.

Q. That paper was deposited in a building that you call the York County court-house?

A. Yes, sir.

Q. Who deposited it?

A. I did; along with other papers.

Q. You know that that building has been burned up?

A. I know that the building was destroyed. The records are burned.

Q. Have you ever made any search or inquiry for your papers?

A. I have, sir. I left Mr. Bigler's bond in the possession of Mr. William M. Vesta, of Williamsburgh, with whom I left all my valuable papers when I went to Lynchburgh to reside.

Q. This Bigler paper you left when you went away, and have looked for it, and cannot find it.

A. I cannot find it.

332 Q. And your best information is, that it was among other papers and destroyed?

A. Either in the removal or the burning; all the records were carried over to King William County, and very important papers were lost.

Q. Have you any memorandum, or is there anything that fixes in your memory the knowledge that that clause which you have reported, was a part of the second contract?

A. Yes, sir.

Q. What is that?

A. About two years after the sale of this farm to Mr. Bigler, I was in Williamsburgh; I was at my uncle's; I heard a gentleman hail me; he was in a small Jersey wagon; I recognized Mr. Bigler coming, a friend with him; he got out, and said he, "Mr. Waller, good morning;" he shook me very warmly by the hand, and I did him; said he, "I wish you to sell me ten, fifteen, or twenty acres;" I don't remember whether he said ten, fifteen, or twenty acres of land, describing the location of the land; I remarked to him, "Mr. Bigler, I will do anything I can for you, and I will take this under advisement; if it does not impair the security which the trust deed affords me, I will certainly let you sell this land." Said he, "I will pay you $15 an acre for it." Said I, "All right, if it does not impair the security." Shortly after that, probably the next day, (though I am not certain, nor do I wish to be understood as giving any positive opinion, but certainly within a short time,) I conferred with Col. Robert McCandlish, a large owner of land on York

River; with Doctor Waller, whose estate joins this estate; with Mr. William Warren, who owned the finest estate on the river; and I submitted to them this proposition.

DEFENDANT'S COUNSEL. What has that to do with it?

Mr. SULLIVAN. It is to show that he did not refuse to comply
333 with the request to sell the land without making the inquiry whether it would probably impair the security or not.

DEFENDANT'S COUNSEL. It is nothing to us whether he relied on the advice he received or not.

WITNESS. In consequence of these inquiries I declined to sell.

Q. What took place between you and Mr. Bigler—what did you say to him, and what did he say to you?

A. I met Mr. Bigler the next day, and told him what the opinion of these gentlemen was, and that in consequence of that I believed that the security afforded by the trust deed would be seriously impaired, and must, therefore, decline to sell him ten, fifteen, or twenty acres, (whichever it was.) Mr. Bigler then said, "Mr. Waller, this contract allows me to call upon you for this land." Said I, "It does, provided that the security is not impaired." Mr. Bigler then said to me, "I thought I was treating with a gentleman." Well, I am an impulsive man, and I immediately said to him, "Sir, that must be retracted." Said he, "What I meant was this: [Not understood. Let Mr. Waller supply it.—Reporter.] I approached him, shook his hand, and from that time until 1861 Mr. Bigler's relations and mine were of a friendly character. I was invited to his house on the Hudson, and he to my house in Williamsburgh.

Q. At what other time, if at all, did he make any demands or requests of you to release any other portions of the farm to himself?

A. Sometime after this, I understood that Mr. Bigler was in desperate pecuniary circumstances; it was in Williamsburgh, and I there noticed that this estate was advertised for sale by Homer R. Ramsdell, I think his name is, or Mr. Ramsdell, of Newburgh. I attended the sale; it was then announced that this estate was sold subject to my lein; Mr. Ramsdell bid, I am almost confident, $25,000. The
334 estate was bought by Mr. Ramsdell at that price, I believe; I am not absolutely certain, but I believe $25,000 was the price; I know I was approached by several gentlemen, friends of mine, who remarked, "Why, Waller, why don't you buy the farm?"

(Objected to.)

Q. It was bought in at $25,000?

A. Yes, sir; the whole estate with all the improvements new.

Defendant's counsel:

Q. What date was that?

A. I think it was in 1856; I am not certain; it was after this request by Mr. Bigler to sell ten, fifteen, twenty acres.

Q. It was a public outcry, was it?

A. Yes, sir.

Q. What improvements had he built on the farm; a dock?

A. Yes, a dock, a saw-mill, a hotel, and various other improvements—improvements which, he says, cost him $150,000. (?)

Q. They were all on the farm when Mr. Ramsdel bought it?

A. Yes, sir; when he bought it for $25,000.

Q. You did not strictly answer the question I asked. Did Mr. Bigler, at any other time than that which you have referred to, ask you to release any portion of that land in small tracts, which he might sell to

the oystermen or fishermen? If so, when, where, and what did you both say?

A. Immediately after I felt obliged to decline selling the ten, fifteen, or twenty acres, I remarked to him, "Mr. Bigler. I wish to do anything in the world I can to further your views in this matter, but I believe this will injure the estate very much in case of your failure to pay; at the same time, I will put you 150 acres of this land, including the ten, fifteen, or twenty running up the river, at the same price which you offer me for this." Said Mr. Bigler, "I am very much obliged to
335 you." In the mean time, he got into these difficulties, and the farm was sold. He was reinstated, as I learned that Mr. Ramsdell sold the farm to Bigler's brother. After that Mr. Bigler requested me to release this 150 acres. I instructed Mr. Robert Saunders to release to Mr. Bigler 150 acres, which release was made, and is now on record in York County. He never made any request to me at all, except those two.

Q. Would the release and sale of that portion of the farm, whatever it was, in the situation in which it was, have been an injury to the value of the farm?

A. It would, because it was in the center of the farm—the center of the river portion of the estate.

Q. How about the right of way through it?

A. Of course allowing him to sell this would have given a right of way through the whole land; it would have been through the entire estate.

Q. It was not desirable to separate it in that way; it would injure its value?

A. It would.

Q. Are you able to state how much, in money value, it would have injured the farm? What is your opinion about that?

A. My opinion, based on others, would be that it would have injured it certainly $5,000.

Q. Do you know when Mr. Bigler left the farm at the outbreak of the war?

A. I do not know, sir.

Q. Only from hearsay?

A. Yes; and from a letter of his.

Q. Mr. Bigler, in his testimony, has referred, and the other witnesses have referred, to the driving or ordering away of Mr. Bigler's tenants from the farm about the date of the outbreak of the war. Have you any knowledge in respect to that event? Were you present?

A. I have no knowledge, sir; I was not within 200 miles of the place at the time.

Q. Have you any knowledge of any intent or organization relative to any such project?

A. Never heard of it, sir, till after its alleged occurrence; I was not within 200 miles of the estate.

336 Q. Were you in any way privy to the act?

A. No, sir; nothing in the world. I heard of it afterwards in a letter which I received.

Q. A letter from whom?

A. From James Bigler, of Newburgh.

Q. Have you that letter?

A. I have not, sir.

Q. Where is it?

A. That letter was a letter to which I did not attach any importance,

not dreaming that this thing would ever occur, and among a great many other papers left by me in Lynchburg was destroyed by my housekeeper when I sold my property. I was then on the Potomac. Mr. Bigler wrote me that Mr. Matt. Waller, Doctor Edward A. Canim, and others, had visited his farm, and driven his tenants off. That was the first intimation I had of any raid, (as he alleges.)

Q. Where was the letter written from?

A. From Newburgh, in this State, I believe.

Q. And addressed to you here?

A. No; Lynchburg, Virginia, and I received it on the Potomac.

Q. Had you, in the meantime, been down to the farm?

A. Not at all on the farm, for one moment, during the year 1861.

Q. When this incident was alleged to have taken place?

A. No, sir; I was not.

Q. Have you read the entire testimony of Mr. Bigler in this case?

A. I read it hastily two days ago at Mr. Fancher's office.

Q. You have read what he states about the destruction of property on his farm?

A. Yes.

Q. Where he speaks of burning and injury done?

A. Yes.

Q. What knowledge have you of that?

A. None upon earth.

Q. Were you present when anything occurred?

337 A. No, sir; I was not attached to the army of the peninsula at all for a moment during the war, and was only on the estate once during the war, which was in 1862, when the sale occurred at that time.

Q. Which sale?

A. The sale that I had made in 1862.

Q. The sale to Mr. Ramsdell?

A. No, sir.

Q. That was the only time you were there?

A. Yes, sir; in 1862—in April the 1st, 2d, or 3d of that month.

Q. Had you any personal knowledge of, or connection with, any of the destruction of the property on the farm which is referred to in the testimony in this case—the burning of the saw-mill and boarding-house, or injury done?

A. Nothing on earth; and, in that connection, I say is it not strange that I should be accused of burning property which is my security for the payment of the debt.

Q. Your answer is that you had no cognizance of it at all, or connection with it?

A. Nothing upon earth.

Q. Were you, at that time, in the army of the peninsula, some portion of which is alleged to have done this destruction?

A. I never was attached to the army of the peninsula for any moment.

Q. At that date, when that injury is alleged to have been done, where were you? Were you in Virginia?

A. I was in Virginia.

Q. Off towards Lynchburg?

A. No, sir; between Richmond and the peninsula.

Q. That injury is alleged to have been done in 1861?

A. No, sir; that is alleged to have been done in 1862, after the battle of Williamsburgh.

Q. You have alluded to some sale of that farm that took place in 1862, that being the time when you were there, the only time during the war; tell what you were there for, and how long you were there, how came you to be there, and what was done?

A. In consequence of word I received from Williamsburgh, I
338 went there, and from a personal interview which I had with Mr. Knapp—(his first name I don't know.)

Q. One of Mr. Bigler's friends?

A. Yes, sir. In consequence of that information I thought it was incumbent upon me to go down to Williamsburgh and see the condition of the farm—the estate. I had then resigned my position in the army of the Potomac. I went to Williamsburgh. I found the estate in the hands of the military of General Magruder's army; I found it was cultivated by anybody and everybody who chose; I found it was claimed to be abandoned property—that Mr. Bigler had not been there for a number of months.

Q. It was claimed by the confederate authorities?

A. Yes; by the confederate authorities. I saw it was going to rack and ruin rapidly, the fences all decayed, and the estate squatted upon by everybody who chose. I consulted with several friends, and, I think, remarked to the trustee that I have——

DEFENDANT'S COUNSEL (interrupting.) No matter what conversation you had with him.

A. I will only say what he said.

Q. What did you do? To the trustee you gave directions to sell?

A. Yes, sir.

Q. You determined to sell the land, did you?

A. Yes, sir.

Q. If you could?

A. Yes, sir.

Q. You told him to foreclose the trust deed?

A. I told him to sell; to advertise, which he did. That sale was in April. The confederate authorities regarded it as abandoned property; that Virginia and the Southern States were at war with the North, and they had a perfect right to it. I contested their right, and Judge Halliburton decided my lien took precedence of any claim which the confederate authorities could acquire from a state of war. The estate was sold; I bought it, and distinctly announced that I had pur-
339 chased that estate for the purpose of protecting it, it being the only security I had for the debt, and when the war closed I should offer the estate to Mr. Bigler, he paying me the purchase-money.

Q. You bought it in?

A. Yes, sir.

Q. Then did you leave?

A. I was there the next day, sir.

Q. And then you left?

A. Yes. I did not see the estate any more till 1865, after the close of the war.

Q. During that period, when Mr. Bigler was absent, did you take anything off of the farm?

A. Not one cent, sir.

Q. Did you authorize any one to do it for you?

A. No, sir.

Q. Did you receive from any person, any quartermaster of the government, or anybody else, any consideration for any property that was taken by the army or the government, if there was any?

A. I received nothing in the world in payment of damages or of rents from the estate, or peaches sold, or lumber sold, as Mr. Bigler alleges in his answer. It may be, however, proper, and certainly it is my intention to announce that I met Major Morris, of Richmond, on one occasion, and remarked to him, "Morris, you are paying for damages and losses and other things; I don't claim of you any damages, because the estate is not mine; I intend to give it to Mr. Bigler; but really I think that, under the circumstances, you ought to allow something for the occupancy of that farm by the confederate authorities." "Well," said he, "I dare say you are right; what shall I allow?" "Well," said I, "It is not much." He did allow me, in confederate money, $2,000, which he paid over to me. "Well," said I, "Mr. Bigler is better off by this $2,000 than if I had not claimed it." It was worth then 13 to 1, confederate money; he paid it to me in November, 1863.

Q. Who was Major Morris?

A. He was at one time professor of law in William and Mary College; he was a quartermaster in Richmond.

340 Q. Had you any agent or anybody there in your behalf to receive any pay for any of that lumber which has been referred to as having been taken off by Gen. Magruder's army, the running of the mill, or anything of that kind?

A. No, sir.

Q. When you bought, who was there of Mr. Bigler's tenants—Mr. Knapp?

A. Mr. Knapp owned part of the land; he was there part of the time, but he was no agent of mine; Mr. Bigler owned part of the land; he left no agent; my object in buying the farm was, if Gen. Johnston had remained in the peninsula, I should have gone to Gen. Magruder and asked him not to allow the farm to be so entirely ruined, as it was then; for I had this interest in 't, and I believe Gen. Magruder would have done anything he could have done, inasmuch as he was an intimate friend of Mr. Saunders.

Q. Something has been said by one of the witnesses about your having given directions to some one about taking away the steam-engine?

A. I have been thinking about that; I recollect Mr. Knapp came to me in Richmond, and remarked—said he: "There is a good deal of old iron round there about the mill." (It was long after the mill had been burned.) "And," said he, "it won't be worth anything to any human being; it is exposed to the rain, will corrode, and be absolutely worthless. I wish you would give it to me." I said: "You can have it;" and then replied to him: "What about the saw-mill; is that covered?" "Yes," said he, "there is a sort of house over it." "Well," said I, "does that house protect it from the weather?" He replied, he did not think it did. "Well," said I, "I wish very much you could bring it up here, and I will sell it." Of course I intended to keep an account of these things, and at the expiration of the war account for these things; but he never did it; he never brought it up there.

Q. You never received it?

A. No.

341 Q. Are you able to form a judgment, and if so, what opportunities have you had, as to the value of the improvements that Mr. Bigler put on the farm after purchasing it from you?

A. No, sir; I never thought of it at all; I did not dream of any difficulty between us—never thought of it.

Q. Mr. Bigler says that, in 1865, he was in Richmond, and had a conversation with you?

A. In Williamsburg; I did not see him in Richmond at all.

Q. He says that you told him the place was yours; that you had bought in the place, and that it had been legally done, according to the laws of Virginia, and you would hold the place. Did you or not make that statement, or those statements, to him?

A. I left a letter with Mr. William N. Henley.

Q. First, did you have the conversation with him?

A. I did, sir.

Q. Did you or not make this statement?

A. So far from it, I left a letter with William N. Henley—a letter stating to Mr. Bigler that I had bought the farm, and intended to surrender it to him whenever he paid for it; the letter was in possession of Mr. Henley.

Q. Verbally, what did you say to Mr. Bigler in connection with that matter?

A. I mentioned that before. I stated to Mr. Bigler: "I am glad to see you, sir; I hope our matters will be settled speedily and amicably."

Q. That was all?

A. That was all, sir, except I told him I had written a letter, and left it with Mr. Henley.

Q. You told him that?

A. Yes; and Mr. Henley told me he had given it to Mr. Bigler.

Q. Did you tell him, when you left him, that Gen. Ludlow had given him (Bigler) possession of the place, and that you should contest it?

A. I don't remember anything at all about it.

WILLIAM WALLER, plaintiff, recalled by Mr. Sullivan, and further examined, testifies as follows:

342 Mr. HAYWARD (for defendant) produces for Mr. Sullivan:

1. The original deed.

2. Uncertified copy of the trust deed.

WITNESS. In stating the other day that Morris paid me $2,000 in confederate money, I find that I was mistaken as to Morris's payment of it. It was on his recommendation, and the quartermaster general of the Confederate States paid me the money; the same amount, however; Col. Myers, or Gen. Myers, was his name.

Q. It was paid for estimated damages to the farm, was it?

A. I don't know; I just made this remark to Morris: Said I, "I think that you ought to give something for the occupancy of the farm."

(Mr. Hayward objects to going over this again.)

Q. State what demand you made, and what statement with reference to that matter. Go on and state the conversation?

A. The conversation was this: I told Morris that I thought he ought to allow something for the occupancy of the farm, and he said he thought so too; and he asked me how much I thought it ought to be; I told him I didn't know; and he said he would mention it, and Col. Myers gave $2,000 in confederate money, then at a discount of 13 to 1.

Q. What did he say about its belonging to you?

A. Morris said it did not belong to me; I told him I knew it; it belonged to Mr. Bigler, and I intended to account to Mr. Bigler at the expiration of the war.

Q. Besides that sale that you have testified about, when you bid in the farm, what other steps, if any, have been taken at your instance to determine the title under the trust deed?

A. Before the sale of it?

343 Q. No, before now. What other steps, if any, have you taken before this date. Was the property sold at any other time?

A. Not by me, sir; it was sold by Mr. Ramsdell at one time; not by me.

Q. Have you ever had any conversation with Mr. Bigler, in which you spoke to him of any intention to hold said title for him? if so, state what you said?

A. I do not remember having had any conversation with Mr. Bigler about that fact; I wrote a letter to Mr. Bigler, which I left with W'm Henley, who was a tenant of Mr. Bigler, and that letter conveyed to Mr. Bigler the information.

(Mr. Hayward objects to the witness stating the contents of the letter.)

Q. Go on without stating the contents; state about the letter you addressed to Mr. Bigler, and who Mr. Henley was?

A. W'm L. Henley, a tenant of Mr. Bigler's, living on Mr. Bigler's estate.

Q. What date was the letter?

A. In the year 1865, but what date I could not tell; in the letter I stated ——

(Objected to as stating contents.)

A. In your office (Mr. Sullivan's) I told Mr. Bigler exactly what I had written in that letter; that I bought the farm for the purpose of protecting it, and intended to surrender the farm to him the very moment I bought it, and told my friends so; a friend of mine said to me: "I congratulate you, Waller, you made a good bargain." "No," said I; "I intend to give this farm to Mr. Bigler the very moment this war terminates, when he offers to pay me the money.

Q. Read that clause which I now put my finger on, in what purports to be a copy of the contract between you and Mr. Bigler, set forth in the answer, and state whether this is the first or the second contract which you have testified to have been made between yon and Mr. Bigler?

(Showing paper to witness.)

344 A. There is one mistake here: the first thing, $5,000, was paid; this paper says $3,000; $5,000 was the subsequent contract and payment made; $5,000 cash was what Mr. Bigler paid me. Here is an immaterial difference—I regard it as immaterial; I don't know what others may.

The contract—this paper—reads as follows:

"Said Waller will allow said Bigler to sell such portions of the land as he may see fit, from time to time, the said Bigler paying over to said Waller such proceeds of the sale as will afford ample security for the liquidation of the residue of the debt due, for the purchase of said estate from said"—The contract, as subsequently agreed upon, read in this wise.

[Mr. HAYWARD (to Mr. Sullivan.) I understand you to say that you did not intend to set up a parol contract.]

WITNESS. This is the original one of April, 1853. The subsequent one agreed upon was written in June, 1853, at the date of the trust deed.

Q. I want you to state whether the second one, which was the true contract, I understand, differed from this. You have already stated the second. I want to distinguish whether this is the second or the first?

A. You will find out that the difference is very immaterial. The language was this—

(Mr. Hayward objects to statements as to the other contract.)

WITNESS. The trust deed recites the contract, and says that this paper is not it; have you the trust deed with you?

Mr. HAYWARD. Yes, sir.

345 (This testimony relative to the second contract is taken subject to objection.)

WITNESS. It says $3,000, and he afterwards paid me $5,000. The difference between this paper and the subsequent is this: "The said Waller agrees to allow said Bigler to sell portions of land from time to time, as he (Mr. Bigler) may see fit, provided such sales will not operate a serious reduction of the security afforded by the trust deed." That is the very language of it. My own opinion was that in selling twenty acres of land, it would operate very seriously, and my opinion was concurred in by all the gentlemen to whom I referred it.

Q. Can you, by looking over that paper, tell whether it is or is not a true and correct copy of the trust deed? (Showing papers to witness.)

A. Yes; Mr. Hayward and I compared. Is that the paper we compared?

Mr. HAYWARD. Yes.

WITNESS. There is nothing different, only one or two little verbal differences; but no difference affecting the questions here. I have a copy of the trust deed, and Mr. Hayward and I compared them a few days ago.

Q. After the commencement of the war, from what date was this farm within the Federal lines?

A. From the battle of Williamsburgh, which occurred on either the 3d or 4th of May, I do not remember which.

Q. What year?

A. 1862; one month after the sale. From that time till 1865 Williamsburgh was in possession of the Federal Army, and Port Magruder, not more than half a mile from Williamsburgh.

Q. From the location of this farm?

A. That was four miles from Williamsburgh—just close to Williamsburgh.

346 Q. Was that farm within the Federal lines, so that Mr. Bigler could get to it?

A. I thought so, sir, certainly; and I certainly was afraid to go to it. I would not have gone to it for anything upon earth. There was no doubt about that, I imagine, and I am willing to state positively that the confederate lines were not in fifty miles of the farm from 1862 up to the close of the war.

Q. Did you know Captain John Sterling?

A. I did not, sir.

Q. Did you know Captain Johnson?

A. I did not, sir. I know both of their buildings, however. I think they are both dead—or Capt Johnson is, as I have heard from Mr. Bigler's own lips.

Q. Did Mr. Bigler ever offer to pay to you the sums which he alleged he was to receive from either of said parties for the sale of a portion of said farm, on the condition that you would release them?

A. Mr. Bigler made me a specific offer—$50 dollars an acre for the land—to release him twenty acres. I declined to do that; and then I offered to release 150 acres, and he paid me subsequently $50 per acre.

Q. He did not specifically offer the sums which he alleges he was to receive from Captain Johnson and Captain Sterling to release twenty acres?

A. No, sir.

Q. Aside from that offer, did you or not give any notice or refusal to Mr. Bigler, prohibiting him from selling any portion or portions of said farm?

A. Never; never prohibited him from selling any of that property in the world, except that one lot of twenty acres.

Q. You refused to release the portion as you have stated?

A. Yes, sir. On the contrary, sir, I did release to him 150 acres.

Q. Are you able to state whether or not Mr. Bigler suffered any damages by your refusing to release the said twenty acres that you have named on the terms that he named?

A. I cannot imagine that he did.

347 Mr. HAYWARD. We don't care for anything you imagine.

A. I don't believe that he did. Mr. Bigler certainly never told me of it till after the war. The first time he told me of it was in your office.

Q. In the city of New York?

A. Yes, sir.

Q. You mean to say that the first time you ever heard from Mr. Bigler that he was damaged by your refusal to assent to the proposition to release that portion of said farm was after the close of the war, in my office?

A. The first time Mr. Bigler ever told me specifically. When he came to me in Williamsburgh and asked me to release the land, he said he could make an advantageous arrangement, if I would let him sell; then I replied immediately: "I will do anything that I can." The first time I ever heard any specific allegation of damage was in your (Mr. Sullivan's) office, in New York.

Q. In his counter-claim he represents that he was damaged by your refusal to acquiesce in the sale, and to release your lien upon the land to the extent of $25,000; what is your judgment upon that subject?

A. I have no idea, sir, that it was 25 cents. Had it been $25,000, why did he not force me to comply with the contract? The whole estate sold for $25,000, I think, after that, showing that the claim of $25,000 for twenty acres, I think, was baseless.

Q. Where is the original trust deed given by Mr. Bigler to you?

A. Recorded in York County court.

Q. It is now?

A. Yes, sir.

Q. It was not destroyed?

A. It was not destroyed. I have since got a copy and Mr. Hayward has got a copy of it.

Q. At the time that you caused that farm to be sold or offered for sale and sold, and contested the title of the Confederate States to confiscate or sequester such farm, was any deed made to you, transferring said title; and if so, where is that deed?

348 A. The deed was made by Saunders to me, under the trust deed; he made me the deed.

Q. The trustee, after the sale, made the deed to you?

A. Yes, sir; I have that deed, I think.

Q. What did you do with it?

A. I think I have a copy of that deed; it was never recorded by me.

Q. You have never recorded it?

A. I think not.

Mr. HAYWARD. I give you notice to produce it.

Q. You say it was never recorded?

A. I think not; I certainly never did, and I don't think Mr. Saunders did.

Q. You now think you have that deed at home?

A. Yes, sir; I know I have it—from Saunders to me.

Q. After the execution and delivery of that deed, did you take possession of said farm?

(Question not answered.)

Q. Did you ever do any act calculated to banish Mr. Bigler from coming on said farm?

A. No, sir.

Mr. HAYWARD. I think you ought to ask him what acts he did.

A. I did no act; and I then declared that I had purchased that estate, not for the purpose of holding it against Mr. Bigler, but for the purpose of protecting the security which the trust deed afforded, and I intended to surrender it to Mr. Bigler, at the termination of the war; expressly—publicly did so fifty times.

Q. To protect it against what claim?

A. Against the Confederate States and squatters generally; everybody was going on, cutting the timber down, and tilling the ground; I expressly declared that publicly everywhere.

349 Q. In this counter claim, Mr. Bigler says that he was damaged by the ejectment consequent upon that sale to the extent of $75,000. Do you know of any acts, by yourself or by your agents, subsequent to to the date of *the date of* that sale, with reference to Bigler, and keeping him from possession? If so, tell us what they were.

A. I had no agents, sir, and, of course there were no acts committed; the only thing I ever heard, or the first time I ever heard of this raid was a letter Mr. Bigler addressed to me.

Q. Subsequent, I say.

A. No, sir; nothing in the world.

Q. Have you any knowledge of any damage to Mr. Bigler, by an ejectment or exclusion from said farm, through your agency, to the extent of $75,000, or any other sum?

A. Not one dime, sir.

Q. After the said purchase, had you any correspondence with Mr. Bigler, relating to that fact?

A. Not one letter passed between us.

Q. At that time was it allowable between where you were and where he was?

A. No, sir.

(As to any second contract as referred to by this witness, Mr. Hayward waives any further notice of demand for the production of the original, so as to permit Mr. Waller's verbal statement to stand as evidence, so far as the notice to produce the original is concerned.)

Q. What acts have been taken at your instance since Mr. Bigler assumed possession of the farm, at the close of the war, with a view to test the validity of your claim against him?

Mr. HAYWARD. Is that in order?

A. No action, except pursuing him on the bond here in New York, and in Virginia; I authorized Mr. Saunders to proceed to sell under the deed. That sale was enjoined by Mr. Bigler before it was made.

350 Q. And remains in that condition?

A. Yes, sir; at this time.

Q. Have you a copy of the bill upon which that injunction was granted?

A. I have in Virginia, sir; not here.

(At the request of Mr. Sullivan, Mr. Hayward agrees to produce a copy of the bill and of the injunction, or he agrees to produce his copy.)

Q. Since that have you done any acts to assert possession and rights to the said farm, adverse to Mr. Bigler?

A. Since the institution of these proceedings?

Q. Yes.

A. No, sir; nothing.

Q. What was the date at which you requested your trustee, Mr. Saunders, to foreclose under said trust deed against Mr. Bigler? This last one, I mean?

A. The last one?

Q. Yes, the one that was enjoined.

A. Enjoined by Mr. Bigler?

Q. Yes, sir.

A. I think it was May, 1866; it may have been June, though I think it was May.

Q. State whether or not the conversation that you have referred to as taking place between you and Mr. Bigler about your claim on him for the purchase money of the farm was prior to this last-named request to your trustee to foreclose?

A. Yes, sir; one occurred in May, 1865, and the other occurred in May, 1866, one year after; I requested Mr. Bigler to pay, and he promised to pay in May, 1865.

Q. In those conversations which you have mentioned with Mr. Bigler, say if anything was said with reference to your purchase of the farm during the war, as constituting a cloud upon his title.

A. None upon earth.

Q. What was said between you and Mr. Bigler?

A. Nothing was said between Mr. Bigler and me to throw the slightest suspecion that I intended to prevent his selling or giving a perfect title.

351 Q. Did he say anything to you with reference to his apprehension, that it was a cloud which was to be removed, or anything of that kind?

A. Not at all, sir; I don't remember that Mr. Bigler made the slightest allusion to it. He stated he owed the money; that he intended to pay, and would but for fear that Congres would pass a confiscation act, and he would have to pay it again; that he had the money at home. When I got to New York, to my surprise he stated to me that I had injured his property.

Q. What did you ever say to him, if anything, on the subject of releasing any claim that might appear to exist in your favor of a cloud on the title?

A. I told Mr. Bigler, not only verbally, but by letter, which is in possession of William L. Henley, or was; I don't know where it is.

Q. State what you said.

A. I told Mr. Bigler that I was then prepared to give him a full, unqualified right to the property if he would pay up the money.

Q. When was that?

A. In May, 1865, after Gen. Lee's surrender, and I have done so repeatedly since.

Cross-examination:

Q. Where did you first see Mr. Bigler after Lee's surrender?

A. In Main street, Williamsburg.

Q. How was that—what conveyance?

A. I think he was in a buggy or sulky (sulkie;) I don't remember about it; he certainly was in a conveyance drawn by one horse.

Q. Coming from where?

A. Coming up Main street; he landed at the grove wharf, on Old Point; I don't know.

Q. Going towards his place?

A. No, sir; he told me he was going to see General Ludlow at the time.

Q. Will you state what conversation was had between you and Mr. Bigler, and in whose presence?

352 A. I will state the conversation, but not the presence: I did not know the name of the gentleman, nor do I know that he heard a word of the conversation; I went on the opposite side of the buggy, or sulkie, whatever it was, (it must have been a buggy, because it contained two persons;) I shook Mr. Bigler by the hand; said I: "Sir, I am glad to see you; I learn that you made a great deal of money during the war, and I hope that our matters may now be amicably and speedily settled." Mr. Bigler appeared somewhat excited, and remarked: "You cannot sue me for the whole amount," or something of that kind; I instantly replied: "It is not my wish to sue you at all, Mr. Bigler." He then said: "I owe you this debt; I intend to pay it; I have the money at home; I would pay it now, but Congress may confiscate the claim, and I be called upon to pay it the second time." In consequence of that conversation I immediately went over——

Q. Just state what was the conversation.

A. That was the conversation. Mr. Bigler left there without my bringing suit; I should have sued him there, without any such conclusion that he intended to pay it.

Q. Was that all the conversation between you and Mr. Bigler at the time?

A. About one hour after that I met Mr. Bigler, on his return from Gen. Ludlow's, and he told me that he had in his possession an order from Gen. Ludlow, putting him in possession of the farm. I did not see the order, nor did I contest Mr. Bigler's right to go to the farm.

Q. Have you now stated all the conversation that occurred between you and Mr. Bigler, at either of those interviews?

A. I think I have; I certainly remember none other.

Q. Was there any other person present, except you and Mr. Bigler, either of those times?

A. Yes, sir. The name of the gentleman I do not know.

Q. Were you introduced to him?

A. I was, by Mr. Bigler.

Q. Was the conversation in such a tone that he might have heard it?

353 A. It is possible he may have heard it; Mr. Bigler was going up Main street; he was sitting on the left-hand side, and I went round to him and made these remarks to him; whether this gentleman heard it or not, I don't know.

Q. Was the other gentlemen alluded to in the carriage?

A. Yes, sir.

Q. You say there was a second contract between you and Mr. Bigler in regard to this estate, made in June, 1861?

A. 1853.

Q. Was that contract in writing?

A. It was, sir; but only varying from this, as I have told you in that particular—just that language used.

Q. Who reduced that contract to writing?

A. Mr. Hammond. I wrote the other contract myself. That expression Mr. Hammond wrote.

Q. You now refer to the second?

A. To the one in June.

Q. The first written contract was in May?

A. No, sir; April 3d, 1853.

Q. The one which is in the pleadings?

A. Yes, sir.

Q. Have you a copy of that second contract?

A. No, sir; I have not.

Q. Did you have a copy?

A. I did, sir.

Q. Will you state wherein the second contract differed from the first?

A. I have stated that, but I will state it again. It is merely this: The second contract this language was substituted for that in the original.

"The said Walker agrees to allow said Bigler to sell any portions of such land as he may see fit, from time to time, provided it does not operate a serious reduction of this security."

Q. Have you seen that contract since June, 1853?

A. I have repeatedly.

Q. How late?

354 A. I saw it in 1862; I saw it three days before the battle of Williamsburgh in 1862.

Q. How came your attention to be called to it?

A. Because all my valuable papers were left with William W. Vest—Vest & Hanesford, of Williamsburgh; I left them all my papers, and this contract was there; I intended to have taken them all to Lynchburgh with me.

Q. Did you read it then?

A. I did at Vest's store—read all the papers, and I requested Mr. Hanesford to keep these papers for me, and bring them to Richmond with him if he left Williamsburgh.

Q. Was that contract recorded?

A. I don't know. I think it was, and I think that the record was in the York County court.

Q. Did you send it there to be recorded?

A. I don't know. I think Mr. Bigler had a copy, and Mr. Hammond had a copy, which he promised to send to Mr. Bigler. This contract was drawn up in conformity to a trust deed, which was dated June 22d, 1853.

Q. Did you take any steps or make any effort about having that second contract recorded? Do you know anything about its being recorded?

A. No, sir; I don't recollect.

Mr. SULLIVAN. Can such a contract as that be recorded—I mean in Virginia?

A. I think not. I don't know.

Q. Do you know whether the records of York County have ever been burned?

A. I understood that a portion of them were burned, and a portion not. I know nothing about it, because I haven't been in Yorktown in ten years.

Q. Were you engaged in the late rebellion?

A. I was, sir.

Q. Were you connected in the confederate army?

A. I was, sir.

Q. When did you become connected with it?

355 A. In May, 1861; I was elected a lieutenant of cavalry.

(It is understood that all on this subject is taken subject to Mr. Sullivan's objection—about any connection with the confederate service; the ground of the objection being, that it is irrelevant and immaterial.)

Q. Where were you from April, 1861, to June, 1862?

A. I was elected in April, 1861, or May—one of the two months; I don't intend to speak with entire accuracy; I went to Manassas in May, 1861; I was at the battle of Manassas; I was then transferred after the battle of Manassas to the 4th Virginia cavalry, on the Potomac, and I remained there till March, 1862; my health became very bad; (I left there in March, and went immediately to Williamsburgh, in consequence of reports I had received of the condition of the estate, and while there, I instructed Mr. Saunders to sell.) It was advertised in February, and sold in April; I was not on the estate in 1861, though I may have been on the peninsula.

Q. Did you go to the estate before you ordered it to be sold?

A. No, sir; I ordered it to be sold by letter.

Q. Where was that letter written from?

A. Written from Occoquan, Fairfax Co., Virginia.

Q. Were you present on the farm at the day of the sale?

A. I was, sir.

Q. Did you bid it off?

A. I did, sir.

Q. For how much?

A. Well; I intended to state, Mr. Knapp has made a mistake, a very serious one, $17,000. Mr. Knapp says $22,000; it was $17,000; I have papers to show all that; my only object in bidding was to secure my debt.

Q. No matter about the object.

A. I am positive it was $17,000; and that was confederate money too.

Q. Were you on the place after the day of sale?

356 A. One day afterwards, sir; the next day I rode down to the estate.

Q. Was the whole, or any part of Bigler's estate, in fact, confiscated by the confederate government?

A. No part, sir; it would have been but for my bidding it in; it was in the hands of the confederate authorities at the time I bought it; and I sold it on that account.

Q. Who was in possession of it at the time you bought it?

A. Gen. Magruder and the military; he was the commander of the army there at the time.

Q. At the time of the sale of this estate, did you give any notice that you intended to buy it for Mr. Bigler.

A. Before the sale?

Q. At the time of the sale.

A. Immediately; immediately after the estate was purchased by me, a friend of mine remarked: "I congratulate you; I think you have made money." I replied: "No, sir; when this war closes, no matter what the result may be, I shall give this estate to Mr. Bigler, on the payment of the debt due me."

Q. What do you mean by contesting the right and decision of Judge Haliburton in your favor?

A. Contesting his decision? I never did that.

Q. Contesting the right of the confederate government and his decision in your favor?

A. I did not contest his decision; his decision was in my favor; I contested this right of Gen. Magruder to hold the land; they held it on the ground that it was abandoned property.

Mr. SULLIVAN. Abandoned by Mr. Bigler?

A. Certainly, and that they had a right to hold it in their possession; that it was their property; I contended it was my property, certainly, against them? I had a better right to it than they had; and to contest that matter I ordered Mr. Saunders to proceed to sell it;

357 Patrick Henry Aylett, the law officer of the Confederate States, enjoined the sale; I brought it before Judge Haliburton, and made a motion to dissolve the injunction, and it was dissolved, on the ground that my lien was superior to any lien the Confederate States could acquire by war.

Q. From whom did you receive two thousand dollars in behalf of this estate?

A. On the statement of Major Morris, I went to the quartermaster general of the Confederate States, and he paid me two thousand dollars, by check.

Q. Who was the quartermaster general?

A. I think it was Col. Myers, or, probably, Gen. Myers; I never in my life saw him after that.

Q. When was that?

A. In 1863, I think.

Q. What month?

A. October, 1863; it may have been September, or November; I don't remember positively.

Q. Do you know whether this estate was in the Federal lines or not, in 1862?

A. Not only so, but the confederate lines were not within fifty miles of it.

Q. Do you know whether it was within the Federal lines?

A. Certainly; of course it must have been within the Federal lines; Gen. Johnston retreated; Williamsburgh is sixty miles below Richmond, and this estate is four miles below Williamsburgh.

Q. I ask you if you know it was within the Federal lines?

A. I believe it was.

Q. You don't know whether it was or not?

A. I don't know; I was not on the peninsula at all after that, except once; not near Williamsburgh; the Federal pickets were thirteen miles above Williamsburgh, and this estate was thirteen miles below where their pickets were stationed.

WILLIAM WALLER recalled and further cross-examined:

358 Q. During the time between March, 1862, when you purchased this estate, and Lee's surrender, did you offer it for sale?

A. I offered to sell my interest in it on a special warranty, expressly stating to the parties that I did not guarantee against Mr. Bigler's claim; and on that ground they refused to take it.

Q. To whom did you offer to sell it?

A. To Jones and Grubs, I think; offered to sell my interest.

Q. When did you offer to sell it?

A. I think it was in 1863, or 1864, I don't remember which.

Q. Did you offer to sell it to any other persons, except Jones and Grubs?

A. No, sir; I think not.

Q. Who are Jones and Grubs?

A. They were citizens of Virginia; one was an old college friend of mine, a son of John W. Jones, speaker of the house of representatives at one time; and Grub—I did not know who he was.

Q. Were they an auction firm in Richmond?

A. No, sir.

Q. Did you offer it for sale at an auction-room in Richmond?

A. I did not. Public sale?

Q. Yes.

A. No, sir; never offered it at public sale at all; except when I bought it in April, 1862.

Q. Did any party or parties in Richmond hold it for sale at any time?

A. Goddin and Apperson were the parties to whom I wrote, and through whom the proposition was made to Jones and Grubs. Wellington Goddin and Apperson.

Q. Who are they?

A. Real-estate agents.

Q. You say you wrote to them, offering it for sale?

A I wrote to Goddin and Apperson, offering that estate for sale—my interest in the estate with special warranty, expressly stating that I did not guarantee against Mr. Bigler's claim, as I recognized him the owner of the estate.

359 Q. Is that firm or are the parties to it existing now in Richmond?

A. I think there is an addition to it; I think it is Harrison, Goddin and Apperson now.

Q. They are there now?

A. They are there now.

Q. When was it that you wrote to this firm?

A. It was in 1863 or 1864; I do not remember exactly which.

Q. Did they make any attempts to sell it?

A. They were the ones who effected or attempted to effect the sale to Jones and Grubs; when called upon to accept the deed, they refused to take it, because I did not guarantee them against Mr. Bigler's claim; I only sold my own interest in the estate, with special warranty.

Q. Did you ever negotiate a sale with any other parties?

A. No, sir; with no other parties.

Q. Did your agents ever negotiate a sale with any other parties?

A. I had no agents.

Q. Were not Goddin & Apperson your agents?

A. I had no other agents than those; that was the firm to whom I wrote to sell my interest in the estate, in 1863; and the sale failed to be made in consequence of the fact that I said I did not sell against Mr. Bigler—I only sold my own interest, recognizing Mr. Bigler's right to the estate; the result would have been only this: they took my place; they merely took the position I occupied towards Mr. Bigler; I did not guarantee against his claim at all; expressly refused to do so; and the negotiation failed on that account.

Q. At the time you purchased that estate, was the sale advertised.

A. It was, sir.

Q. Where?

A. In the Virginia papers; in two Virginia papers; I think a Richmond Whig and Richmond Enquirer; I am not absolutely certain about it; it would have been advertised here, if the war had not somewhat interrupted communication.

360 Q. Were those papers Richmond papers?

A. Yes, sir; both of them.

Q. You think the Whig?

A. I think the Whig and Enquirer.

Q. You say it was not advertised in New York papers?

A. No; there was no communication between the two sections at that time.

Mr. SULLIVAN. In consequence of war, you stated?

A. Yes, sir.

Redirect examination:

Q. What paper is that? (Showing a paper to witness.)

A. It is a letter received by me from Mr. Bigler, in 1866—March.

Q. Do you know it to be Mr. Bigler's handwriting and his signature?

A. Yes, sir.

Q. You have seen him write, and know his signature?

A. Yes; a hundred letters have passed between us. I mean only to say, that many letters had been written.

(Mr. Sullivan offers letters, in evidence, marked "Plaintiff's Exhibit, No. 1.")

Q. Please state what that paper is? (Showing another paper to witness.)

A. That is the bond, sir; written by me in 1853, and signed by James Bigler—a bond for $25,000.

Q. That was the bond given for the purchase of the estate?

A. Yes; the original bond given by Mr. Bigler to me.

(Offered in evidence by Mr. Sullivan, marked "Plaintiff's Exhibit, No. 2.")

361 Q. That is the deed given by the trustee to you. (Showing paper to witness.)

A. That is the deed which was executed to me by Robert Saunders, the trustee of this Bigler farm, in pursuance of the sale which I have spoken of, in April, 1862.

Offered in evidence by plaintiff's counsel.

(Received, subject to objection, and marked, "Plaintiff's Exhibit, No. 3.")

Q. How much time elapsed after you bid in the farm at that sale before the military lines changed so as to include the farm in the Federal lines?

A. About one month, sir. The sale took place, I think, on the 1st or 3d of April, and the battle of Williamsburgh was fought on the 4th of May.

Q. You have spoken of having released from the lien of your trust deed to Mr. Bigler, 150 acres of the farm; what, if anything, was said by you and Mr. Bigler, at the time that release was made, connecting that release with his request that you should release smaller lots?

A. Mr. Bigler had requested me to release to him 20 acres of land, probably a year before this. I declined doing so; I then proposed to him (for my feelings towards him at that time were very kind) that I should release 150 acres, at the same price that he offered me for 20 acres—$50 per acre.

Q. Did it include that?

A. It included the very land that he asked me to release; that proposition he acceded to, and it was released—150 acres.

Q. Do you know whether Mr. Bigler, out of that 150 acres released by you, made sales to any of the parties for whom he had desired a release of the smaller tracts?

A. My impression is, sir, but I don't know——

Q. Have you any knowledge about it?

A. I have no positive knowledge.

Q. You have stated that this Exhibit 3 is the original deed?

A. Yes, sir.

362 Q. Tell me, as a matter of fact, whether it ever was put on record?

A. I think not, sir.

Q. Don't you know it would be marked if it was; did you ever put it on record?

A. Never, never.

Q. There is a letter referred to in Exhibit 2—a letter dated 20th of December, which Mr. Bigler writes about—where is that letter?

A. That letter is now in the possession of James Alfred Jones, in Richmond, my lawyer there in the motion I made to dissolve the injunction obtained by Mr. Bigler; it is in the possession of James Alfred Jones

(Mr. Hayward, in answer to a question of Mr. Sullivan, states that he is willing that the letter referred to should be introduced, as soon as it is identified as Mr. Bigler's letter.)

Recross-examined:

Q. You say you released to Mr. Bigler 150 acres of that estate?

A. I did, sir.

Q. Did that land all lie in one body?

A. Yes, sir.

Q. Did it include some 60 or 70 acres which was afterwards bought by Knapp?

A. It did not; Mr. Knapp had bought before I released it of Mr. Bigler; my trust deed operated on Mr. Knapp's land at the time of sale.

Q. On what part of the estate did that 150 acres lie?

A. It included this 20 acres running all along the river—the 20 acres which Mr. Bigler wished me to release to him, which I declined to do; and then extended along the river, probably three-quarters of a mile.

Q. How far back from the river; how wide a strip was it?

A. I suppose three or four hundred yards; I could not answer that question.

363 Q. How far above the village did it extend; how far above the dock?

A. Immediately from the village, sir.

Q. Up or down?

A. West from the village; York River runs east and west, and it is to the west of it.

Q. Where did it commence; at the dock?

A. No, sir; not exactly at the dock.

Q. How far from the dock?

A. Not more than 100 yards; of course, I cannot answer accurately; it may have been 75 or 150 yards; it was but a short distance from it.

Q. And extended about three-quarters of a mile up the river.

A. I think three-quarters of a mile; it extended west to Carter's Creek; but Mr. Bigler has the deed, which will tell; and I am not able to answer this question, and I don't like to appear to give an answer indefinitely.

Q. Did it include the village lots?

A. It did not, sir; it did not include the improvements that Mr. Bigler had made; he did not ask me to include them; as I said, it was west

of these improvements; extended from these improvements west; did not include them.

Q. Was that all the land that you ever released to Mr. Bigler, of that estate?

A. Yes; I think so; I may have released a half an acre or an acre; I don't remember; this is all that I now remember; certainly not five acres, nor one acre more, that I now remember; that deed will explain all that.

Q. Did you release the 150 acres to Mr. Bigler's grantee?

A. No, sir; I never executed any paper in the world, except to Mr. James Bigler.

Mr. SULLIVAN. State what offer, if any, you have ever made to Mr. Bigler, in connection with this claim of yours, to execute deeds of release in settlement of this, to remove your claim?

364 A. I have always stated to Mr. Bigler that, whenever he paid the money, I would execute him a full release deed.

O. M. SMITH, called by Mr. Hayward, in behalf of the defendant, and duly sworn, testifies as follows:

Q. What is your residence, your name and age?

A. I reside in Newburgh, State of New York, and was 59 years of age last September.

Q. Were you formerly a partner of Mr. Bigler?

A. Yes, sir.

Q. In reference to this estate?

A. Yes; Virginia estate.

Q. When did you become connected with him in that estate?

A. I think about the year 1853.

Q. How long were you interested there?

A. Well, I think, as near as I can recollect—I could not be positive with regard to the time precisely—I think 1857 or 1858 that I sold out to Mr. Bigler. I think it was 1857. I made no particular minute of it, and could not be positive, particularly with regard to the date.

Q. Did you reside on the premises?

A. I did not reside on the premises; that is, I was there a great portion of the intermediate time between 1853 and 1857. If I am right, about that time I was off and on two or three times a year. The longest period I remained there was about three months.

Q. Were you acquainted with the improvements that were made upon the estate?

A. Considerably so, having been there at the time the improvements were made, and having the direction of them.

Q. Were you acquainted with the transactions with reference to the estate during that time?

MR. SULLIVAN. What do you mean by transactions? Do you mean the improvements being made, or the management of the estate?

365 Mr. HAYWARD. Any transactions with reference to the estate at the time—any attempted sale or sales of any portion of the estate?

A. There were not any sales made, while I was there, of this estate. I say none. There were sales made, but they were conditional; they were not perfected.

Q. State anything you know, from your own knowledge, with reference to those conditional sales.

A. Well, there were sales made to a gentleman by the name of Jackson, [or Johnson,] and a gentleman by the name of Sterling, condition-

ally; that is, they agreed to pay so much money for the property which was upon the York River front, embracing the oyster ground, if we would give them a perfect title to the land, which not being able to do, the bargain fell through. We did not actually perfect the sale; that is to say, we did not succeed in giving a title.

Q. Explain what you mean by giving a title.

A. We could give the title on the conditions of the original contract with Mr. Waller, who should consent to have the estate sold from time to time. We could not give the title to the estate, because we could not get a release of the property.

Q. A release of the property from whom?

A. From Mr. Waller.

Q. Were there any conditional sales?

A. Not that I recollect during the time I was there; not personally. I was acquainted both with Mr. Johnson and Mr. Sterling, and knew the circumstances.

Q. Do you know anything about a conditional sale to Matt. Waller?

A. Yes, I knew the circumstances under which Mr. Waller wanted to purchase the property.

Q. State what you know with regard to it.

A. Well, sir, the estate that we had from W'm Waller was contiguous to Dr. Matthew Waller's; he wished to purchase land that was contiguous to his estate.

366 Mr. SULLIVAN. State what he said and what you said, not in general terms what was said.

Mr. HAYWARD. State what you know with regard to it.

A. He gave to me, as an objection for not buying, that we could not get a release of the property from Mr. W'm Waller.

Q. How much did he want to buy?

A. He proposed two conditions: 600 acres, one patch, for a certain price, and 2,000 in another; I forget just the quantity; could not be positive with regard to the number of acres.

Q. Do you know of any attempt to get a release from Mr. W'm Waller?

A. I only know through my partner.

Q. Anything that Matt. Waller said?

(Objected to by Mr. Sullivan. Taken subject to future objection.)

A. I don't know that I ever saw Matt. Waller and William Waller together—in conference together. I only know what the doctor told me. I had different interviews with Dr. Waller, trying to effect a sale; talking it over with him (Matt. Waller.)

Q. The sale was had on condition, you say?

Mr. SULLIVAN. Let him first tell what actually was done.

A. Well, sir, that was the only condition.

Q. What was that condition?

A. The condition was, that we would give him a title, or a release from William Waller.

367 Q. It fell through, because you were unable to obtain that.

A. Yes, sir.

Mr. SULLIVAN. It is merely from hearsay that he states that.

A. No. I know from Dr. Waller himself.

Mr. SULLIVAN. You know it from Dr. Waller, and not from William Waller?

A. Yes, sir.

Q. I want to ask you, Mr. Smith, what your opinion is of the rental value of that estate between the years 1861 and 1865?

Mr. SULLIVAN. Were you there on the property after 1855?

A. Well, I think I was, sir. As I remarked before, I was not very positive regarding the dates. I was there back and forth frequently. In 1857, about, I think I ceased to be a partner.

Q. Go on and state your opinion in regard to the rental value of the estate during the time I have mentioned.

A. I will, as near as I can. I was there during the erection of the dwellings, all of them; during the erection of the large boarding-house, which contained the store; during the erection of the principal part of the said mill—a large saw-mill, grist-mill, and brick-yard. I had the superintendence of the mill. During the erection of several tenant-buildings I was there, and during the erection of those just mentioned, and cooper shop, &c.

Mr. SULLIVAN objects to the witness answering the question put to him on the ground of incompetency.

Mr. HAYWARD. Go on.

368 A. I should state that at that time we calculated that the property was worth a rent of $7,000 a year.

Q. In your judgment?

A. Yes, sir; in my judgment, taking the store and mill, &c.,—the real estate.

Q. I want to ask you what, in your opinion, the whole improvements made upon that estate prior to 1861, cost, in round numbers?

(Objected to as incompetent.)

Q. State, in your opinion, what it cost?

A. I do not know; I cannot tell the positive sum that it cost; I know about the buildings, because I was there most of the time; I did not figure it up so as to tell.

Q. Will you state, to the best of your knowledge, what the dock cost?

(Objected to as incompetent. Taken subject to objection.)

A. I was there at the sawing of the timber; part of my business was to keep the books, so that I did not carry with me the figures.

Q. Were you a partner at the time it was built?

A. Yes.

Q. Conversant with the cost of the same?

A. Yes, sir; conversant with the whole; shipped a great many cargoes of timber to the Norfolk navy yard.

Q. Will you state what was the cost?

A. I can, to the best of my judgment; I should not think it cost less than $20,000.

Q. You were conversant with all the improvements made upon the estate?

A. Up to the time when I left; there may have been some improvements made there since I left.

Q. Will you state what the buildings cost, up to that time?

A. It is a pretty difficult thing to come at—the fair value; I will try to come at the fair figure if I can get at it; the amounts were

369 handed in to our book-keeper at the time, I having returned, or being in the business with Mr. Bigler at Newburgh; and I had one set of books to keep there, and could not keep both, and the figures I could not tell exactly; there was the big house I speak of—the brick boarding-house, and that contained a store; it was a building which, I should think, cost at least $10,000.

Q. The boarding-house cost $10,000?

A. I should think it cost all of that, according to my best judgment.

Q. What did the other buildings cost?

A. The other buildings were less in value—smaller buildings; I should think the cost from five to seven hundred dollars.

Q. Each?

A. Yes, sir.

Q. How many were there?

A. I think there were four built while I was in company with Mr. Bigler.

Q. Would you put them at $2,400?

A. Yes, I should think that would be about a fair price; they were little buiidings for tenants; this big building, the boarding-house and store, was built of brick—expensive.

Q. Will you state what the other improvements would cost that were made while you were there as an owner?

A. I don't know as I could state now specially, sir.

Q. As near as you can state?

A. I was not connected with the soil improvements; there was some ditching, and some cultivation of the soil—improvements that I could not state particularly about, and was not connected with at all; I had the direction and management of this work that I have spoken of.

Q. You spoke of a portion that Dr. Matt. Waller wished to purchase. Was that less or more valuable than the rest of the estate?

A. Well, sir, I don't know whether it was less valuable, taking the whole estate through; there was some part of the portion that he talked of buying that must be more valuable than the other; if I recollect right, his conversation was, that he would give thirty dollars an
370 acre for six hundred acres, and twenty-four or twenty-eight dollars an acre for 2,400 acres; he considered one part a little better, yet it would run pretty generally through alike, as far as my recollection and examination serve me; I purchased the estate originally, and travelled the whole ground over myself; but it is pretty difficult for a man to come to a conclusion in regard to the parts of it.

Q. Were you connected with Mr. Bigler when he purchased?

A. Yes, sir.

Q. Were you knowing to the negotiations and the purchase?

A. I was there, and negotiated, and drew the article, in company with Mr. Hammond, who was the agent of Mr. James Bigler at the time.

Q. Will you read that contract set out in the defendant's answer, (handing paper to witness.) Was that a copy of the agreement for the sale of the estate between the parties?

A. Yes, sir. That (handing paper to Mr. Hayward) is the article I drew, in my own handwriting. I wrote it myself and swear it is a copy.

Mr. SULLIVAN. You have sworn that this is a copy, (referring to answer.)

A. No, I don't swear it is; I think it is; I drew this copy (the other paper,) myself; that makes me safe about it; I brought it along with me.

Q. Will you look at that, (showing paper produced by witness himself a moment ago,) and state whether it is a copy of the agreement for the sale of the estate—the agreement between the parties?

(Objected to. Taken subject to objection.)

A. Yes, sir; I will swear to it positively, and I will guarantee that it don't vary a word from that in the answer; I swear that it is a copy of that, made with my own hand.

371 Q. You wrote it yourself?

A. I wrote it myself; I will swear to that—in the presence of Mr. Waller and Mr. Hammond.

Mr. HAYWARD offers the paper in evidence.

(Mr. Sullivan objects, that there is no proof that the original is lost.

Marked: Defendant's Exhibit No. 1—of June 28th, 1867.)

Q. Was the purchase of the place based upon that agreement?

A. It was, sir. This was the purchase of the place; this was the contract.

Q. Was there any other contract made subsequent to this, in its place or stead?

A. Not to my knowledge.

Q. Were you present at the time the deed was passed for the property?

A. I was not; I was at Newburgh, New York; Mr. Bigler, my partner, was present with Mr. Hammond, his agent.

Cross-examination:

Q. Who was Dr. Matt. Waller?

A. He was a cousin of William Waller; that is the most I know about it; he belonged to the family of old Dr. Waller, of Williamsburgh.

Q. He lived on the land adjoining the Bigler farm, did he?

A. Yes, sir; south of it.

Q. Was there any agreement in writing between him and Mr. Bigler, and yourself, with reference to the proposed purchase that you have spoken about?

A. Never, sir, to my knowledge—no agreement in writing.

Q. Was there any consideration or forfeit-money to pay by him to Bigler or yourself?

A. No, sir; not to my knowledge. I was there.

372 Q. Were you on or near the farm, between 1860 and 1865?

A. I havn't been on the farm since 1860; it was previous to 1860 that I left it.

Q. How long before 1860 was the last time you were there?

A. As I stated before, I could not be positive whether it was 1857 or 1858 that I left; it was one of those dates.

Q. Then you knew nothing about the condition and rentable value of the property after 1858, except what you may have heard from the reports of others?

A. I have based my opinion on what it was when I was there.

Q. As to the condition of the property from 1860 on, in respect to anything that would affect its rentable value, you knew nothing except what you heard from others?

A. No, sir; I was not there.

Q. What would have been the rentable value of the estate, in the condition in which you left it, or if it was the locality of armies contending, and disturbing the entire peace of the neighborhood, preventing its use and occupancy all the time?

(Objected to. Taken subject to objection.)

A. Well, sir; I merely answer that I don't know; it is impossible for me to understand how to make such an estimate; I could not estimate the value of the use of that estate, when it was occupied by armies shedding blood and fighting and destroying; because I was not there.

Q. In your judgment, would that affect it or not?

A. I should think it would, but the amount I cannot tell.

Q. What was the extent of your interest in the farm, while you were there?

A. One-eighth only, I think.

Q. Was the farm ever rented out, with all these improvements on it?

373 A. No, sir; not entirely—never rented the mill.

Q. Were the buildings rented?

A. Yes, sir; all rented except the public-house, the boarding-house—called a public-house; it was built for that purpose.

Q. Was the mill let?

A. Yes. I won't be positive whether the mill was rented while I was there or not; I think not; the saw-mill and grist-mill we used ourselves; but subsequent to my departure, it was rented.

Q. That is, you heard so?

A. No, I did not hear so; I know it was talked of while I was there, and we did not get our price.

Q. Do you know, except from what you heard, that it was rented?

A. According to my best recollection, I don't remember that it was ever rented. I remember——

Q. (Interrupting.) If you don't remember, don't state.

A. I only remember the thing was talked of; we did not rent it while I was there.

Q. Was the dock ever rented while you were there?

A. No, sir; not that I remember.

Q. Your estimate, as to what the rentable value of the property was, was based upon what the cost of the improvements and of the farm had been, wasn't it?

A. Not entirely, sir; my estimate of the rent was based upon the amount of business we were doing—the brick-making, the lumber-sawing, the corn-grinding, and the use of the land; it is only my opinion; I never have had any talk with anybody about it; at any rate, that is what I told the man I would take for the use of it, and he promised to give me an answer in a month, and didn't do it; I have the same opinion about it now, that I had then.

Q. Is Dr. Matt. Waller living?

A. No, sir; I understand that he is dead. I was well acquainted with Dr. Waller.

Q. Did you make this copy (Exhibit No. 1, of this date,) at the time the original was executed?

374 A. Yes, sir; it is the copy I brought from Virginia.

Q. It is completed—contains everything?

A. Yes; anything that can be found more than that, must have been made subsequent to my leaving; it is in my own handwriting; I myself was in the mill at the time; Mr. Waller and I had quite a time in drawing it up; he insisted that I should draw it, and I did.

JAMES BIGLER, recalled by plaintiff's counsel, and further examined, testifies as follows:

Q. Have you read Mr. Waller's testimony?

A. I have.

Q. I wish you to state whether there was any second contract with reference to the purchase of that estate by you of him?

A. I am not aware there was any subsequent contract; I don't remember any; the purchase was based upon the contract made by agent, Mr. Hammond.

Q. You say there was no second one made?

A. Never, to my knowledge; this was the one that was carried out;

I paid him 5,000 dollars, though, instead of 3,000 dollars; that only left a less amount to be paid; that is all the difference.

Q. Has the place been sold at the present time?

A. I have agreed with a party to take the place, which he hasn't done yet.

Q. No conveyance has been made?

A. No, sir.

Q. Then you did not wish to be understood that you had sold it?

A. I did not sell it; it has not passed out of my hands; I have only agreed with a party, and they haven't complied with their agreement; they agreed to purchase it, but havn't done so yet; I have never given any title to it.

Q. Have you received any rent from that estate during the time you were out of possession of it, between the years 1861 and 1865?

A. Not one cent; I was on the place in the spring of 1865, and
375 saw the tenants, and asked by what authority they were on that place, and they told me that they hired it of Mr. Waller's agent (objected to) whom they were going to pay the rent to. (Objected to what transpired between Mr. Bigler and these tenants, so-called, unless Mr. Waller was present.) When I got possession of the place from General Ludlow, I went down to the place, and I saw several men on the place who were occupying different portions of the land; I saw one man getting rails; I asked by what authority he was on that place, and what he was doing; he told me that he hired the property of Mr. Waller's agent (objected to) and should pay the rent.

Have you read Mr. Waller's testimony, with reference to the conversation had between you and Mr. Waller, at Williamsburgh, in June, 1865?

A. It was in May.

Q. Will you state whether that was true or not?

A. Well, part of it is true, and part of it is not true; the fact is, that he saw me there; but that I admitted that I owed him, or said I would pay him, there is not a word of truth in.

Q. State what did transpire?

A. I think I did state that in the former testimony.

Q. Will you state whether you introduced him to the gentleman who was with you?

A. I did; to my partner, Mr. Southard, who was present during all the conversation.

Q. You say that his version of the testimony is not true?

A. It is entirely one sided—not true—that part of it is not. In regard to the confiscation of the land by Congress, there was no such talk at all.

376 Q. There is some testimony in your direct examination, and some by Mr. Waller, in reference to the damage occasioned to you by the loss of the sale of those river lots. Will you state what damage you experienced by the loss of the sale of those lots?

(Objected to as having already been testified about by this witness, and because, also, the mode proposed of contradicting Mr. Waller is not correct. Taken subject to objection.)

A. I lost, in consequence of not making that sale at that time that I demanded the title and offered to pay Mr. Waller the money I received; I lost $2,000 by not making the sale of these; it was a very great damage to me otherwise, and in dollars and cents I cannot compute it.

Q. Did Waller afterwards release to you 150 acres?

A. He released to me an indefinite number of acres; he released a

certain strip of land, commencing at a point below the mill, running to Cappahoosa; I never had the acres computed.

Q. Was it about 150 acres?

A. I should say 100 acres; it may have been 150 acres.

Q. Was that all that he released to you of the estate?

A. That was all that he released at that time.

Q. Did he ever release those village lots?

A. No; none of them.

Q. Then this 100 or 150 acres did not include the village lots?

A. No, sir.

Q. What was the rental of that estate worth from April 19, 1861, to May, 1865?

A. I have looked over that matter; I consider the rent of it per year a cheap rent at $7,000, including the mill, farm, store, and dwellings, and oyster fronts—including all the property.

Q. I understand you to say that that Matt. Waller sale fell through through refusal of William Waller to release?

377 (Objected to as incompetent, and as leading; that he can be asked by defendant's counsel about any facts about that sale that he has not already testified to.)

Q. If you have any additional facts with reference to that matter, state them.

A. I consider that it was in consequence of Mr. Waller's unwillingness to release that the property was not sold to Matt. Waller.

Q. In your opinion, what is the value of the estate at the present time?

(Objected to; taken subject to exception.)

Q. What was the value of it in May, 1865?

A. I took an account of my stock—my yearly estimate of values of property—and I put that property down in 1865 at $40,000; it was very cheap at the price I bought it; it would have brought $40,000, I think, easily; that was soon after I got possession of it that I put it down at $40,000.

Q. You say you contracted to sell it for $30,000?

A. Yes.

Q. Have you at any time admitted to Mr. Waller that you owed him, this money?

A. No, sir; I have not.

Cross-examined:

Q. Was the trust deed executed by you after this original contract dated 2d April, 1853?

A. Yes, sir.

Q. Wasn't this a second contract with reference to the land?

A. No, sir; it was the carrying out of the contract; he covenanted to give me a deed of it.

Q. You haven't answered my question.

A. I did not consider it in that way.

Q. Was there ever any memorandum made or signed by you to the effect of, or containing these words: "The said Waller agrees

378 that the said Bigler shall sell the land as he may see fit, provided it does not operate a serious reduction to the security afforded by the trust deed?"

A. No, sir; never signed any such deed to my knowledge, or any such contract or memorandum.

Q. Did you ever receive such a one from Mr. Waller?

A. No, sir; only the one original, signed by Mr. Hammond as my agent; I never saw such a paper as that, to my knowledge; Mr. Hammond was my agent at the time, doing this business; had written instructions from me to buy this place of Mr. Waller.

Q. To make this contract?

A. Yes, sir; that contract was sent to me, submitted to me, and approved by me, and Mr. Hammond then went and executed it.

Q. Did Mr. W'm Waller ever tell you that he declined to assent to release his trust deed upon portions of land, upon the ground that such a release would impair the value of his security?

A. No, sir; he said he would not have the place cut up.

Q. Was that all that he said?

A. He said he was going to be the judge of what would impair his security, and he would not; he was not going to have it sold in that way; he did not say it would impair his security.

Q. Then when he made the remark, what did you reply about impairing the value of the security?

A. I said he had made the contract, and I thought he ought to stand up to it.

Q. That is not the answer; when he said that he would be the judge whether it would impair the value of the security, what did he say, whether it would impair the value of the security or not?

A. He did not say anything about impairing the security, except that he should be the judge of that; said I, "I will give you all the money I receive for the place, and it won't take long to pay the entire amount, and then you certainly may be secure;" at the rate I offered it.

Q. Then the question as to whether the value of the security would be impaired was discussed, as you now state, between you?

379 A. No; the discussion was about cutting the place up.

Q. Then the discussion was, as you now state it, you saying, "I will pay you the money as fast as I sell," and he saying, "No, I will be the judge of it?"

A. "I will not have the place cut up; I will judge about securities."

Q. Was the subject of impairing the value of the security discussed between you and him any further than you have now stated?

A. I think that is about the substance of it, sir.

Q. In giving your estimate of the rental value of the farm, do you apply that to the property as it was before the war broke out?

A. My idea is what it was when I left the place; when my folks left the place; the condition it was in; I never saw it after that until I saw it in May, 1865.

Q. And you make that opinion not only on the supposition that the farm continued in the same condition, but that the circumstances around it continued the same after the war?

A. Well, that might be; the circumstance of the war might have made the mill worth nothing, and might, on the other hand, have doubled the value of it; my mill here was doubly valuable during the war, and that there would have been if I could have been there to attend to it.

Q. Would you have sold to the confederate government?

A. Well, that is a question I would not like to answer; I would not, though; but if I could have got to the mill, I could have made it doubly valuable furnishing our own Government; I undertook to get there in 1863, and could not get there.

Adjourned to Tuesday, the 2d of July, 1866, at 1 o'clock p. m.

GEORGE H. SOUTHARD, called by Mr. Hayward on behalf of the defendant, and duly sworn, testifies as follows:

Q. What is your place of residence?

A. Newburgh, New York.

380 Q. Did you go to Virginia in May, 1865, with Mr. Bigler?

A. I did.

Q. Were you present at Williamsburgh when a conversation took place between the plaintiff and defendant?

A. I was.

Q. Did you hear this conversation between the parties: Mr. Bigler—"Well, you cannot sue me for the whole amount; you cannot sue me for the whole amount." My response was: "Mr. Bigler, I did not come here to sue you; I have merely come to ask if we cannot settle this matter." His response was, "I owe this money, sir; I acknowledge the debt, and I would pay it now; I have the money at home, but I fear Congress may possibly confiscate the claim, and I be called upon to pay it the second time." Did you hear any conversation of that kind?

A. No, sir.

Q. Did you hear any conversation between the plaintiff and the defendant at that time?

A. I did.

Q. Will you state what that conversation was.

A. Mr. Bigler and myself rode over from Yorktown to Williamsburgh, and were riding up the Main street of Williamsburgh, and we met Mr. William Waller; we were riding in a buggy; he spoke; the buggy stopped, and Mr. Bigler introduced me to Mr. Waller; Mr. Waller asked Mr. Bigler if they could not settle up their matters; Mr. Bigler said he was going to see General Ludlow, and that he would talk with him after he came back; when we returned from General Ludlow's, we met Mr. Waller again, and Mr. Waller repeated the question—asked Mr. Bigler if they could not settle up—could not adjust their matters; and Mr. Waller stated that the estate had been sold under the trust deed, (and that he had bought it in, and that he could hold it;) that the State of Virginia would legalize his claim to it; Mr. Bigler said he did not think that he (Waller) had complied with the requirements of the trust deed, as far as advertising, giving sixty days' notice by ad-

381 vertising in the newspapers of New York and Richmond; Mr. Bigler said that he had been to see General Ludlow, and General Ludlow had put him in the possession of the property; Mr. Waller said that he should contest that, and that the State of Virginia would keep him in possession; that was the substance of all the conversation that occurred.

Q. Did he claim to be in possession of the estate at that time?

A. He said that he had bought it in under this trust deed, and that he claimed the ownership of it—claimed that it belonged to him—that it was his.

Q. That he should contest Mr. Bigler's legal possession of it?

A. Yes, sir.

Q. Did you go on to the estate?

A. I did.

Q. Did you go over it?

A. We went over a considerable portion of it.

Q. Are you acquainted with the rental value of real estate generally?

A. Somewhat; yes, sir.

Q. What, in your judgment, would that estate be worth per year?

A. Well, I should suppose from five to ten thousand dollars a year.

Q. Rent?

A. Yes, sir.

Q. Was there any conversation between the plaintiff and the defendant that you did not hear?

A. No, sir; I heard all that was said; I was there when the first interview occurred; we then went down to see General Ludlow; there was but very little conversation; Mr. Bigler simply said that he would see the general, and would talk with him (Waller) when he came back; I heard all that was said to the end, between the parties; as soon as this conversation was finished, Mr. Bigler and I went our way, and Mr. Waller went his way.

Q. Did you read Mr. Waller's testimony in this case, as subscribed by himself.

A. I did.

382 Q. Is anything in the plaintiff's testimony to the contrary of what you have testified true?

A. It is not; not as relates to this interview between the plaintiff and the defendant.

Q. Did you hear the plaintiff tell the defendant at that interview that the Supreme Court would have to settle this matter?

A. I heard the defendant tell the plaintiff that he had got nothing to say about that; that the Supreme Court of the United States would probably have to settle that.

Q. Was there anything said about confiscation?

A. No, sir; not to my knowledge.

Q. And no admission that the debt was due?

A. No, sir; Mr. Bigler was very evasive in his remarks about it; said that that matter would have to be settled by the Supreme Court; that he should admit nothing; that was the substance of it.

Q. You went on the place with Mr. Bigler at that time, and he took possession?

A. Yes, sir.

Q. Did you find tenants on the place?

A. Yes, sir; there was quite a number of people there living in the different houses there.

Q. Did Mr. Bigler inform them that he took possession of the estate?

A. Yes, sir; informed them that he took possession of it by authority of General Ludlow; these tenants said that Mr. Waller had possession of the estate; up to this time, they had been living there under Mr. Waller's possession of the estate; that the estate, as they understood, belonged to Mr. Waller.

Q. They had been living there as his tenants?

A. Yes, sir.

Q. Was there anything said about their paying rent to Mr. Bigler?

A. I don't remember anything being said.

Q. Did they decline to pay rent to Mr. Bigler?

A. No, sir; I don't think Mr. Bigler made any claim for rent at that time; he did not to my knowledge; we were not together all the time, so I don't know but that he may have done so when I was not with him.

383 (Mr. Sullivan not being present, does not cross-examine at this hearing.)

SOUTHARD recalled:

Mr. Sullivan, plaintiff's counsel, without raising exceptions to the

form and relevancy of the questions in chief, cross-examines the witness, who testifies as follows:

Q. Prior to 1861, were you in the employ of Mr. Bigler, (defendant,) or in any way connected in business with him?

A. No, sir.

Q. In what relation did you go with him to Virginia, in 1865?

A. I was at that time clerk for him.

Q. Where?

A. In New York City at that time.

Q. Why did you go to Virginia?

A. We went together to look after his property there—to look after this estate; we made a rather extended trip through Virginia; to Fortress Monroe, and to Richmond, and across to Washington back, stopping at Norfolk, to attend to some business there.

Q. For him?

A. Yes, sir; with him.

Q. You went there as his clerk?

A. Yes, sir.

Q. On the day when you say you were present at a conversation between Bigler and Waller, where were you when that conversation took place?

A. I was on Main street, in Williamsburgh; I cannot tell the exact place, but it was on the corner of a vacant lot where we met Mr. Waller in the street.

Q. Were you on foot, or in a carriage?

A. When we first met Mr. Waller, we were in a carriage; afterwards, we were on foot; we left the carriage, I think, after we went to see Gen. Ludlow; and when we came back and had the second conversation, we were on foot.

384 Q. When you were in the carriage, and Mr. Waller spoke to Mr. Bigler, who was with Mr. Waller?

A. I don't remember that anybody was; I think he came from a group of people—that is my impression—and came out into the street.

Q. And spoke to Mr. Bigler?

A. Yes, sir.

Q. What did he say first? Give, as nearly as you can, his language, putting it in that very person.

A. He asked Mr. Bigler as to his health, I think, and then said to him that he understood that he had made considerable money during the war, as near as I remember his language, and wanted to know if they could settle up their matters.

Q. What did he say? Did he say, "Mr. Bigler, can you now settle for the farm," or something like that? Give me his words.

A. "Can we settle up our matters," as near as I can remember; and Mr. Bigler said he was going to see Gen. Ludlow about the matter, and that he would talk with him after he came back.

Q. What did Mr. Waller say to that?

A. He said, "Very well."

Q. And you went to see General Ludlow, did you?

A. Yes, sir.

Q. What did Mr. Bigler say to General Ludlow with reference to getting possession of the farm?

(Objected to, on the ground of irrelevancy and immateriality. Taken subject to objection.)

Q. State what Mr. Bigler said to General Ludlow about his coming for the farm?

A. Mr. Bigler said that he had come out there to get possession of the place; "I have come down here to get possession of the farm belonging to me;" (this is as near as I remember; this is the substance of the conversation;) "my men were driven away from it at the commencement of the rebellion; I haven't been able to come down
385 here since; now, I am going over there to see the place, and I understand that there are other parties, different parties, on the place, that claim that Mr. Waller is the owner of it, and I would like to have you put me in possession of it." General Ludlow said that Mr. Waller had been there; these men were on the place, and Mr. Waller wanted him to put him in possession of the place; that he told him he understood it belonged to a gentleman in the North, and that he had refused to do it.

Q. What did Mr. Bigler say?

A. Thereupon General Ludlow gave Mr. Bigler possession of the place.

Q. Gave him an order?

A. I don't think there was any order; but he told Mr. Bigler he could go on and take possession.

Q. That was the whole of it, was it?

A. That was the substance of the conversation.

Q. When Mr. Bigler left General Ludlow's, how long before you saw Mr. Waller again?

A. I think it may have been 5 (five) minutes or more.

Q. Did he ask you to go with him to see Mr. Waller?

A. I cannot remember whether he put that question to me; I was with him all the time, and we went together.

Q. If you cannot remember, state that you cannot.

A. I don't remember that he put that direct question to me.

Q. When you met again, was Mr. Waller alone?

A. Yes, sir; he was.

Q. But you all the time had stayed with Mr. Bigler, had you?

A. Yes, sir.

Q. Was there any understanding between you and Mr. Bigler, that you were to stay with him?

A. Mr. Bigler said to me just before we met Mr. Waller, it would be well for me to remember what he said, as we may have occasion to use it hereafter.

Q. Are you positive he said that?

A. Yes, sir.

Q. On that occasion?

386 A. Yes, sir.

Q. And why did he say that he might have occasion to use it hereafter?

(Objected to. Taken subject to objection.)

A. I don't know why he said so.

Q. Didn't he say why?

A. No, sir; he didn't say why, any more than that.

Q. Then you kept pretty close to Mr. Bigler during that conversation with Mr. Waller, after that, did you?

A. Yes, sir; I heard the whole they said.

Q. Did Mr. Bigler say to Mr. Waller that he had with him a cautioned witness, and apprise him to get a witness?

A. No, sir.

Q. Didn't put him on his guard in any way?

A. No, sir.

Q. Then which spoke first? You were cautioned to bear witness; now say what your memory is of which spoke first?

A. I could not say, certainly, which passed a word first.

Q. What was the first thing? Give the words of the speaker? The first thing which you remember either one said with reference to the farm?

A. Mr. Bigler said, "Gen. Ludlow has given me possession of the farm," and then Mr. Waller asked him what he was going to do about their matters—if he could settle them up; Mr. Bigler said to him that the Supreme Court would probably have to settle their matters.

Q. Didn't Mr. Waller say, "Are you not going to pay me what you owe me on the farm?"

A. No, sir.

Q. Didn't he make some reference to the fact that Mr. Bigler had not paid for the farm; that that was the matter that was to be settled up?

A. Nothing more than he asked him, as near as I can remember, if they could not settle up that matter, and understood that Mr. Waller referred to some balance that was due on the farm.

387 Q. Did you understand it from something that was then said?

A. No, sir.

Q. Before you met Mr. Waller, did not Mr. Bigler say something about that he owed this money to Mr. Waller, but that he meant to make some offsets against it?

A. Yes, sir; I think——

Q. (Interrupting.) He told you that?

A. Yes, he said something to that effect; I don't remember exactly.

Q. Was that just before he told you to be cautious and watchful, as a witness?

A. No, sir.

Q. Some time before?

A. Yes, sir.

Q. Before you saw Gen. Ludlow?

A. Yes; I think he told me that on the way there, or before we started.

Q. And that was a part of your business down there—to help to look into that matter, and to be a witness, wasn't it?

A. No, sir.

Q. Mr. Bigler had, then, talked about the matter with you before you started—about his owing Waller, and about his claim for an offset?

A. Yes, sir.

Q. Did Mr. Bigler, in either of these conversations that you speak of, say to Mr. Waller that the reason why he would not pay was because Mr. Waller had gone through some forms of a suit? Did he say anything about that?

A. No, sir.

Q. Did he tell Gen. Ludlow that there had been any proceedings to sell the farm under the trust deed?

A. I think not; I don't remember.

Q. Did he, in any of the conversations, lay any stress upon that subject at all?

A. In the conversations with me?

Q. With Waller?

A. No, sir; I don't remember that he did.

388 Q. It was nothing, except that he claimed that he had some offsets?

A. Yes, sir.

Q. For injuries done by the confederates to the property—to the farm?

A. Well, he did not, in this conversation with Mr. Waller.

Q. I refer to any time. Was there anything that he claimed, except that he said he had some offsets on account of injuries done the property?

A. He did not tell me any specific claim he was going to make.

Q. Wasn't it always with reference to offsets of some injuries that were alleged to have been done to the property—to the farm?

(Mr. Hayward objects to the statement of any conversation between the witness and the defendant. Taken subject to objection.)

A. Mr. Bigler made no particular statement to me about his claim against Mr. Waller for any offsets. The conversations I had with him were general entirely; he made no specific claims; did not tell what his exact claims were, except that he had offsets against Waller for damages done to the place.

Q. By whom?

A. That was done to the place by the confederate forces, and by Waller; he did not go into any particulars to me as to his claim against Mr. Waller, at all.

Q. Did you go with Bigler down to the farm?

A. Yes, sir.

Q. You are certain he took no authority from Gen. Ludlow, in writing?

A. I think he took none. I don't remember of seeing any papers passed.

Q. Did he take any guard with him?

A. Soldiers?

Q. Yes.

A. No, sir.

389 Q. He went on to the farm and took possession?

A. Yes, sir.

Q. There was no resistance?

A. No, sir.

Q. Mr. Waller was not there, was he?

A. No, sir.

Q. In the second conversation when, as you say, Mr. Waller claimed that he could hold the farm under the purchase that he alluded to, and at the same time asked Mr. Bigler to settle the affairs—the matters between them—didn't he say that, notwithstanding the sale, all he wanted was the payment of the balance due on the purchase?

A. I don't remember that he said that.

Q. Don't you remember that he said something of that substance?

A. No, sir.

Q. How, if he claimed to be the owner of the farm, could he be asking for any settlement?

(Objected to.)

A. I don't know about that.

Q. Wasn't there anything in the conversation to connect the two ideas at all? You say that Mr. Waller claimed to hold the farm—the property—and, at the same time, was demanding a settlement; what else was there in the conversation that connected those two things?

A. There was nothing, that I remember.

Q. Did he not say something to explain what he meant by holding or buying it—that he bought it in for Bigler, and would hold it for Bigler; didn't he say that?

A. He said that when he bought the place he had calculated to return it to Mr. Bigler, whenever they could made a settlement.

Q. Whenever he paid the balance due?

A. Whienever he paid the balance due he would return the place.

Q. You are positive that he said that? At the same time—(interrupted.)

390 Q. Why didn't you recollect that before, when you were giving the conversation?

A. I told the conversation as near as I remembered it.

Q. Did Mr. Waller say that plainly and explicitly to Mr. Bigler?

A. I think he did.

Q. Did he not go on farther, and, at some length, tell Mr. Bigler how it was that he bought it in, and closed up the trust deed; did he not do that particularly and specially?

A. Tell him why he bought it?

Q. Yes; how he came to foreclose it? Did he explain that he did it to save the property from damage and waste?

A. He said the place was all going to rack and ruin, I think, and he had it sold to save it.

Q. Did he not say it was to save it from confiscation—from seizure by the confederate authorities?

A. No. He said the place was all going to rack and ruin, and he had it sold to save it.

Q. Did he not say that the soldiers were ruining it, because there was nobody to hold possession of it, or something of that kind?

A. I don't remember that he did.

Q. When he told Mr. Bigler that he had bought it to save it, and to return it to him (Mr. Bigler) when he should have paid the balance of that purchase-money, what did Mr. Bigler say to that?

A. I do not remember the exact course of the conversation. I cannot remember when Mr. Waller made the remarks to Mr. Bigler that I have stated; what I remember is the substance of what each one said.

Q. On the one point, then, with reference to this explanation given by Mr. Waller, that he bought the farm for Bigler—on that point what did Bigler say?

A. I don't remember what he said.

Q. Well, did he make some allusion to that—some reference to that?

A. I don't remember the exact conversation there was. I know Mr. Bigler made these remarks.

391 Q. (Interrupting.) Did he not make some reply to that statement of Mr. Waller?

A. He might have said: "Well, that may be," or something of that sort. I think, as near as I remember, he made no reply at all; or, if he did made a reply, it was very evasive; that is, he simply said: "Well, that may be," or something to that effect.

Q. Did not Mr. Waller make an explanation before Mr. Bigler went to see Gen. Ludlow, as well as after?

A. No, sir; he did not.

Q. Was this statement that was made by Waller, that he had bought the farm, calculating it for Bigler, made in the same connection as the remark that he thought that the State of Virginia would legalize his claim, as he expressed it? It was made in the same connection, wasn't it?

A. I think he said that after Mr. Bigler said that Gen. Ludlow had given him possession of the place, that then Mr. Waller said that he should contest that, and that the State of Virginia would legalize his claim to the place.

Q. Then how long after that was it that he said to Mr. Bigler (or was it before that)——

A. (Interrupting.) I think it was before that that he spoke about buying in the place for Mr. Bigler. My impression is, that he made this remark about contesting Mr. Bigler's title to the place after Mr. Bigler told him that Gen. Ludlow had given him possession of it, and that Mr. Waller spoke in relation to his paying him the money that was due on the trust deed, after Mr. Bigler told Mr. Waller that the courts would have to settle that matter. Waller said that he should contest his possession of the place, and that the State of Virginia would legalize his possession of it.

Q. Why did you not, in your examination-in-chief, state that Mr. Waller had notified Bigler, in that conversation, that he had bought in the place, calculating it for Mr. Bigler?

A. It did not come into my memory at the time.

Q. So far as you know, did Mr. Bigler converse with Mr. Waller on the day you have referred to, except in your presence?

392 A. No, sir.

Q. Mr. Waller, in his testimony, says that before he said to Mr. Bigler, "I am glad to see you; I hope our matters will be settled," &c., he told Mr. Bigler that he had bought the farm, and intended to surrender it to him, whenever he paid for it. Was what you recollect to have been said by Mr. Waller, on that point, said at the time that he names?

A. No, sir; I think he said it afterwards; after he spoke about hoping the matter would be settled.

Q. Which of the parties, in that conversation, referred to Mr. Henley?

A. Mr. Waller, I think.

Q. Who was Mr. Henley?

A. I understand he was the man who was living on the place; at Bigler's Mills.

Q. One of the old tenants?

A. Yes, sir; so I understood.

Q. At what part of the conversation did Mr. Waller refer to Mr. Henley?

A. The exact part of the conversation I cannot say; but I think it was near the latter part of it.

Q. Wasn't it in that part of the conversation in which he was telling him that he had bought in the farm for Mr. Bigler's account?

A. I don't remember that it was.

Q. What letter did he say that he had left with Mr. Henley for Mr. Bigler?

A. He said that he had left a letter with Mr. Henley for Mr. Bigler—mentioned it to Mr. Bigler.

Q. Didn't he say what was in the letter; did he not tell Mr. Bigler the general nature of it?

A. Yes, sir; it related to his ideas about this matter that was in controversy between them.

Q. And that idea was that he had bought the farm for Mr. Bigler.

A. No; I don't remember that he said that; all that I remember was, that he had left a letter with Mr. Henley, that would explain the matter to Mr. Bigler.

Q. What matter; about his buying in the farm?

393 A. No, sir; I don't think that he mentioned that thing in particular.

Q. When you went down to the farm with Mr. Bigler to see Mr. Henley, did you see him; did you get the letter from Mr. Henley?

A. No, sir; I think Mr. Henley read the letter.

Q. To Mr. Bigler.

A. Yes, sir.

Q. Was it addressed to Mr. Bigler?

A. I think it was; I didn't see the letter at all, except in Mr. Henley's hands.

Q. Did he not hand it to Mr. Bigler?

A. I think not; I think he offered it to Mr. Bigler, and Mr. Bigler asked him to read it.

Q. And then Bigler took it?

A. No, sir; I think Mr. Henley kept the letter.

Q. Did you hear it read?

A. Yes, sir.

Q. Where is Mr. Henley now?

A. I cannot tell you; I don't know.

Q. You don't know whether he is on the farm still or not?

A. No, sir; I haven't the slightest idea.

Q. You are certain Mr. Henley told Mr. Bigler the letter was addressed to him?

A. Yes, sir; I understood Mr. Henley to tell Mr. Bigler that that was a letter Mr. Waller had left for him.

Q. And that it was read to Mr. Bigler?

A. Yes, sir.

Q. And that letter told him that he had bought in the farm for him?

A. I forget the exact contents of the letter; I didn't suppose it was matter of any particular moment, and don't remember it.

Q. Mr. Bigler had not, before hearing that letter, cautioned you to remember that—that it might be of some use hereafter?

A. No, sir.

Q. You are certain of that?

A. Yes, sir; I am certain of it.

Q. Or that it might be of any advantage?

394 A. No, sir.

Q. Let me read the question to you again. Don't you recollect that that letter, from Mr. Waller to Mr. Bigler, told Mr. Bigler that that farm had been bought in by him (Mr. Waller) for him (Mr. Bigler,) and was held, subject to the payment of the balance unpaid upon the farm, for Mr. Bigler?

A. No, sir; I don't recollect at all about that; I didn't pay particular attention to it.

Q. Is your memory not good except when you do pay particular attention, on the request of somebody, to certain facts?

A. A matter of that sort, not concerning me particularly, unless I had occasion to remember it, I should not tax my memory with it at all.

Q. With reference to these conversations, do you remember anything well, except those things with reference to which Mr. Bigler asked you to be particular to remember them?

A. The general conversation, I don't remember particularly about it; if it was a matter that did not concern me at all, I could not remember it well enough to state the exact conversation; this particular conversation, I remember, because he (Bigler) mentioned to me that I had better remember it—better pay particular attention to it, and hear it, and remember it.

Q. Mr. Bigler did?

A. Yes, sir.

Q. You are positive that in these conversations between Mr. Bigler and and Mr. Waller, nothing was said by Mr. Bigler with reference to the purchase by Waller constituting a cloud upon his title?

A. No, sir; I don't remember anything of the kind.

Q. Did Mr. Bigler ask Mr. Waller to make him any deed, and remove any cloud upon the title?

A. In that conversation?

Q. Yes; either of the conversations.

A. No, sir.

Q. What, if anything, did Mr. Bigler, in any of the conversations, say about his having money to pay for the farm, if he was bound to pay for it?

395 A. He did not say anything about it; did not say anything about paying for it at all, or about having any money.

Q. When Waller, as you say, told Bigler that he had bought in the farm, intending it for Bigler, didn't he, at the same time, say that he was ready to make any conveyance that might be necessary, or something to that effect?

A. I don't remember that anything was said about any conveyance.

Q. The caution, by Mr. Bigler, to you to take note of the conversation and remember, as you have stated, was made after the first conversation took place, not before the first conversation?

A. I think it was after we came out; after the first conversation and before the second.

Q. When Mr. Waller came out to the buggy first, he came to the opposite side from whence you were sitting, didn't he?

A. Yes.

Q. And stood opposite to Mr. Bigler?

A. Yes, sir.

Q. You did not pay as particular attention to the first conversation, then, as you did to the second?

A. Yes, sir; I paid just as much attention to the first as to the second, but the first conversation was very short.

Q. Did you read Mr. Waller's testimony before you were asked to testify in this case?

A. I read Mr. Waller's testimony; yes, sir.

Q. In whose presence?

A. I don't know that there was anybody in particular; I was in the office; there might have been other people in.

Q. In Mr. Bigler's office?

A. Yes; J. Bigler & Co.'s office.

Q. Who gave you the testimony to read?

A. Mr. Hayward

Q. Was Mr. Bigler in the office any of the time?

A. I think not.

Q. Are you still in Mr. Bigler's employ?

396 A. I am a partner with him now.

Q. How soon after you were present at this conversation when you were asked to bear it in mind?

A. I want to correct an answer I just made; I remember that Mr. Waller's testimony in the case—I read part of it going up on the cars, going home, one afternoon; Mr. Bigler was with me; I took the testimony in my bag in the cars, and read it going up. The other part, some part, I guess, of his testimony, I read in the office.

Q. How long after the time you were cautioned to bear these conversations in mind by Mr. Bigler, did you become his partner?

A. It was in May, 1865; it was less than a year; it was the next April.

Q. You had been his clerk before that time?

A. Yes, sir.

Q. When you were reading this testimony of Mr. Waller's, on the cars, you and Mr. Bigler were in the same car?

A. Yes, sir.

Q. You refrained from speaking to each other on the subject, did you not?

A. We conversed on the subject of the testimony.

Q. You did?

A. Yes, sir.

Q. How long after that was it that you first knew that you would be examined in this case?

A. I knew it a long while before that.

Q. You knew that when you were reading the testimony and conversing with Mr. Bigler about it?

A. Knew that I would be examined in the case?

Q. Yes.

A. I understood from Mr. Bigler, before that, that I should be called upon to testify.

Q. But you did not know at that time, when you were talking with Mr. Bigler, that you would be called upon to testify to that particular point, and about these conversations?

A. That was the only point that I knew anything about the case; the matter of these conversations was all that I knew about the case.

397 Q. Of course, in this conversation in the car, when you had this conversation with Mr. Bigler, he did not express any opinion or recollection as to whether Mr. Waller's account was the correct one or not, did he?

A. Yes, sir; he did. He said that it was not.

Q. He did not undertake to say wherein it was not, and mention in what respects he thought Mr. Waller had stated it wrong, did he?

A. Spoke about several points.

Q. He did not include, amongst those points, any of the points that you have now testified to, and contradicted Mr. Waller in, did he?

A. Yes, sir.

Q. He did?

A. Yes, sir.

Q. Have you read over Mr. Bigler's testimony?

A. A portion of it; I think the whole of it.

Q. At the same time?

A. No, sir.

Q. How long afterwards?

A. I cannot tell; I have read it at different times.

Q. Did Mr. Bigler tell you, in the car, as to the points upon which you contradicted Mr. Waller's testimony? Did your statement, verbally, in the car, correspond with what is written here, as to the points wherein he contradicts Waller?

A. I don't understand you.

Q. You say Mr. Bigler referred to the points of Waller's testimony, in which he contradicts him?

A. Yes, sir.

Q. What Mr. Bigler said in the car, in the way of contradiction, was that the same as what is written down here in contradiction?

A. In Mr. Bigler's testimony?

Q. Yes, sir.

A. I think it is; (I have read Mr. Bigler's testimony at different times.)

Q. Your recollection is—

A. That it is just the same.

Q. Was it after that conversation that Bigler had with you in the car that you read Bigler's written testimony?

398 A. I cannot say whether it was or not; I think part of it was read before, and part of it after; I think that I read his testimony about the times that he testified; whenever the testimony was there in the office, I had curiosity enough to take it up and read it.

Q. Mr. Bigler did not talk with you about the case, as it progressed, on these points, did he?

A. No, sir; he did not talk with me, particularly, about the case.

Q. Did you keep posted on your own interest?

A. On my own curiosity; yes, sir.

Q. Did you ever own any interest in any property down in the neighborhood of Willamsburgh—any farm property, or any other property?

A. No, sir.

Q. From your own knowledge, had you any idea of the value of property there?

A. Nothing more than I have heard people—different persons—say.

Q. And that has been chiefly what Mr. Bigler has said, in conversation with his friends, on the subject?

A. No, sir; it was with other people too.

Q. With reference to that particular farm?

A. Yes; conversations of different people from Virginia, with reference to that farm.

Q. Your judgment, then, that you have given, as to the value, was based entirely on hearsay with regard to that farm?

A. Yes, sir; and I have been on the farm, and know how many acres of land there are, and what I should think the land is worth; I have been all over the land to look at it; know about the improvements, and what there is on the farm; I based my judgment on that as much as on anything.

Q. When Mr. Bigler went down there with you to take possession of the farm, who were on the farm?

A. Quite a number of persons.

Q. Were they the same men, any of them, that had been left there by Mr. Bigler before he left—before the beginning of the war?

A. Yes, sir; I so understood.

399 Q. As long as you stayed there with Mr. Bigler nobody made any resistance, or claimed to interfere with you in any way?

A. Some of the tenants, when he told them that Gen. Ludlow had put him in possession of the place, told him that they understood Mr. Waller was the owner of the place.

Q. Did anybody interfere with Mr. Bigler in any other way?

A. No, sir.

Q. From that time to this, for aught you know, Mr. Bigler has remained in peaceable possession of the place, hasn't he?

A. Yes, sir.

Q. If there has been anything made out of the farm, he has made it?

A. I don't know what has been made out of the farm.

Q. If there has been anything he has made it?

A. I suppose so.

Q. When you were Mr. Bigler's clerk, did you receive, or did you know of Mr. Bigler's receiving, after the opening of the war, any letters from Mr. Waller?

A. Yes, sir; I think I know of his receiving letters from him after the close of the war.

Q. After the opening of the war?

A. I was not with him at the opening of the war, and did not know anything about it.

Q. In what year did you become his clerk?

A. In 1865.

Q. Did you know where these letters were; did you have the filing of them—those that were received after the close of the war?

A. No, sir; Mr. Bigler took care of those letters himself; they were private letters, that did not refer to the business.

Q. How many of them were there?

A. That is more than I can tell; I don't know as I know about all of them; I remember of two or three letters.

Q. From Mr. Waller?

A. Yes, sir; after the war.

400 Q. Did they relate to the farm and the matters between Waller and Bigler?

A. Yes, sir.

Q. Had they been received before the visit made by you and Bigler?

A. No, sir; at least no letters that I know of. Those letters that I refer to were received after our visit down there.

Q. In them all, didn't Mr. Waller write to Mr. Bigler that the farm was purchased in for Mr. Bigler?

(Objected to by Mr. Hayward, who says defendant will introduce the letters in evidence.)

Q. In your examination-in-chief, after you had stated what the conversation was, you were asked if there was "anything in the plaintiff's testimony to the contrary of what you stated, that was true." You answered: "It is not, as relates to this interview." To-day you have admitted that the plaintiff did say something about his having bought in the farm for Mr. Bigler. Do you still adhere to that statement in your examination-in-chief, that nothing in his testimony was true except what you had then stated?

A. That matter of his having bought in the farm?

Q. The other day you said that he had not stated it.

(Objected to on the ground that it is not correct to state that the witness said he, Waller, did not say as alleged.)

Question repeated.

A. Either I did state that in my testimony the other day, or else it did not come into my memory at the time; and when I made that answer that, as far as I remembered at that time, it was not the case, I know there were some points in Mr. Waller's testimony that I remembered distinctly were not said; and I supposed at the time that in my testimony I had mentioned that point, for it had come into my mind.

Q. Since your memory is proven to have been at fault on one point, may it not also be at fault on some other point?

401 (Objected to, that the question is based upon a wrong assumption; that the witness was not questioned upon the point referred to, and did not state anything about it.

Question repeated. Objection renewed.)

The witness says: My mind is strongly impressed with the general tenor of the conversation. I know that Mr. Bigler did not admit that he owed Mr. Waller anything.

Q. Hear the question again, and answer it, yes or no.

Question repeated.

(Objected to on the same ground, that there is in the question an assumption that the memory of the witness is at fault, which is improper. Objection sustained.)

Q. How many of the tenants on the farm were the same when you and Mr. Bigler went there, that Mr. Bigler had left in possession?

A. I don't know, sir; I had no knowledge of the place when Mr. Bigler left it.

Q. You only knew, from the conversation between them and Bigler, that some of them were the same tenants?

A. Yes, sir; I understood that from Mr. Bigler and from the conversation.

Q. You were asked, in your examination-in-chief, this question: "They (meaning the parties on the estate) had been living there as his (Waller's) tenants?" and you answered, "Yes, sir." What did you mean by the word "tenants?"

A. That they had been living on the place with the permission of Mr. Waller, as the owner of the place.

Q. That was what they said, and what you inferred?

A. What I inferred from what they said. They said they were
402 living there as tenants of Mr. Waller. I won't say they used the word "tenants," but that was the substance of what they said.

Redirect examination:

Q. Have you read Mr. Bigler's evidence in this case as to what transpired between him and Waller while you were present?

A. Yes.

Q. Is it substantially correct?

(Objected to. Question withdrawn.)

Q. Have you any interest, as Mr. Bigler's partner, in this estate?

A. No, sir.

Q. Did Waller, at the time these conversations took place, say that "the place was his, that he had bought in the place, and that it had been legally done according to the laws of Virginia, and that he would hold the place?"

(Objected to, that it ought to have been (or was?) asked on the direct examination; also, as leading.)

A. Yes, sir.

Defendant's counsel offers in evidence a letter.

(Objected to as fragmentary, and that only part of the correspondence of which it is a part is produced. Admitted. Marked Defendant's Exhibit D.)

Also, another letter, marked Defendant's Exhibit E.

Also, another, marked Defendant's Exhibit F.

Also, diagram of the premises in question, (the estate in suit,) marked Defendant's Exhibit G.

Defendant rests.

Adjourned.

403 Mr. Sullivan offers in evidence a letter from defendant to plaintiff, marked "Plaintiff's Exhibit No. 1, July 23d, 1867." G. R. B.

Also, another letter from defendant to plaintiff, marked "Plaintiff's Exhibit No. 2, July 23d, 1867."

WILLIAM WALLER, recalled by Mr. Sullivan, and further examined, testifies as follows:

Q. During the year 1867 what offer, if any, in relation to the selling of the farm, was made to you by Bigler?

A. Mr. Bigler offered to sell me the estate.

Mr. HAYWARD. Was this in writing?

A. Yes, sir.

(Mr. Hayward objects to going into the contents of the writing, or stating what the offer was, without anterior proof of the loss of the writing.)

Q. Was there any conversation with him—between you and him?

A. Not conversation, but correspondence.

Q. Did you or did you not ever decline to release any portion of the farm that it might be sold to Dr. Matt. Waller?

A. I never in my life heard of any proposition to Matt. Waller from Mr. Bigler, or from Mr. *Bigler* to him. I was very anxious for Gov. Tazewell——

Witness states further, but the reporter does not understand, and asks him to repeat what he said.

(Mr. Hayward objects to it, on the ground of irrelevancy. Taken subject to objection.)

A. I repeatedly offered the estate to Gov. Tazewell ,the father-in-law of Dr. Waller, (Matt. Waller,) at $25,000, before I sold it to Mr. Bigler at $30,000.

404 Q. Did you ever tell Dr. Matt. Waller not to buy any portion of said farm from Mr. Bigler, or express any opinion that Mr. Bigler would fail, or his title not be good, or anything of that nature?

A. I never heard of anything in the world between Matt. Waller and Bigler about the land in my life.

Question repeated?

A. No; I did not.

Q. When Mr. Southard was at the farm, in 1865, *on* the occasion when you met Mr. Bigler, what opportunities did Southard have to go over the estate?

A. Mr. Southard and Mr. Bigler got to Williamsburgh one morning. They went down to the estate that evening, and the next day they went to Petersburg. I went to Richmond, and came up on the boat with them.

(Mr. Sullivan notifies Mr. Hayward to produce letter of Mr. Waller to Mr. Bigler, dated May 3, 1860.

Mr. Hayward accepts oral notice.

Mr. Sullivan proposes to ask a few questions, with the understanding that if the letter just called for shall be produced, the testimony shall not be regarded as part of the record.)

Q. Looking at the letter of May 12, 1860, you will see that it refers to a letter from you. What was the subject of that correspondence?

A. That—the other matter—was a settlement of the entire claim. I proposed to Mr. Bigler that, if he would pay me the $13,000 due, that I would take off six per cent.; and his letter—this letter—is in reply to that proposition of mine. He has then reduced it, as this will show, $1,840. There was a thousand of principal, and $840 of interest on $14,000; he owed me $13,000 after making this payment. I then wrote the proposition to him, that if he would pay the $13,000, I would take off six per cent., and this letter is in reply to that proposition.

Q. This letter of May 12, is a reply to it?

405 A. Yes, sir; this letter of May 12, 1860.

Q. In your former examination, you spoke of a second memorandum of agreement, with reference to the terms upon which you would release portions of this estate from the effect of the deed of trust. State when, and upon what instrument, that second agreement was made?

A. The second agreement was about the 22d of June, 1853. Allusion is made to it in the trust deed. By the first agreement, Mr. Bigler was to pay me $3,000; by the last agreement, he was to pay me $5,000, which was done by him. It varied from the first, in some other respects or particulars, as well as varied from it in this particular.

Q. On what paper or instrument was it made?

A. I said it was incorporated in the trust deed.

Q. By whom was it signed?

A. By Mr. Hammond and myself; it was written by Mr. Hammond.

Q. By Mr. Hammond, as what?

A. As Mr. Bigler's agent.

Q. What money, if any, did Mr. Bigler ever offer to pay you on account of any sales of any portion of that farm?

A. Mr. Bigler never offered to pay me anything, except a thousand dollars for 20 acres—fifty dollars an acre, which I declined. That is the only proposition he ever made me, with reference to releasing the land at all.

Q. What was the rental value of that farm, in the condition in which it was, worth from April 19, 1861, to May, 1865?

A. I do not understand the question. Do you mean for agricultural purposes, or cutting timber from the land?

Q. I put the question to you as it was put upon the former examination by the opposing counsel to Mr. Bigler. I don't think you quite get the meaning of it.

Q. (Repeating.) Under the circumstances and the conditions of things prevailing, from April 19, 1861, to May, 1865, for agricultural purposes, what could that estate probably have been rented for per annum?

A. I would not pay $200 a year for it. I will give my reason.

406 Q. Go on.

A. My reason is that any property that was put upon the land, and anything made on it was subject to be destroyed by both armies, that of Gen. McClellan and that of Gen. Johnston, or by raids from either army, and I would not have exposed property there. I would not have rented it on any terms; would not have had my property there, because it would have been liable to be destroyed at any time.

Q. During that period, and under the circumstances referred to, what would have been the probable rental of the said farm, including the store, and dwellings, and oyster front?

A. Well, sir, the same objection applies, that it would have been subject to raids from either army. I would not expose my property there at all; I would not rent it under such circumstances, on any terms.

Q. Do you apply that remark or opinion to this property alone, or to property in that section?

A. All that section of country; it was utterly destroyed, a large portion of that country destroyed, utterly ruined.

Q. For renting purposes to the owner, what was the probable value, per annum, of the mill located on that farm during that period?

A. The rental privileges?

Q. Yes, sir.

A. Do you mean for cutting timber?

Q. Without permission to cut timber from the land?

A. I would not suppose, sir, it could be rented at all?

Q. Why?

A. Simply because there was no timber anywhere in that neighborhood that could have been purchased, and the mill, of course, would have been worthless, unless timber could have been got. Mr. Bigler had timber on his farm. He bought it chiefly for the timber, I believe. There were fifteen hundred acres of timber land on it. The balance was marsh and cleared land. If you ask me what I think the farm would rent for before the war, I think I can answer that.

Q. What would the farm, improved as it was by Mr. Bigler, have rented for prior to the war?

407 A. For agricultural purposes, sir, I should suppose $1,000 a year, and I will give my reason for saying that.

Q. Give it.

A. There are about 600 acres of cleared land, and land there of that character was worth a rental of about $2 an acre. I have rented it for less than that. I rented Dr. Matt. Waller a farm sold to Gov. Tazewell, containing 500 acres of cleared land, for $500 per annum; the land being marsh, the same character and quality as Mr. Bigler's.

Q. $2 an acre for the Bigler land would be a fair price—the cleared land?

A. Yes, sir; I think that would be a fair value.

Q. Including the oyster front and the buildings, what was the fair rental value of the farm before the war, in your opinion?

A. Well, sir, I suppose about $2,000, including the store and the other buildings.

Q. Before the war?

A. Yes, sir; I cannot tell positively, but that is my impression.

Q. What was the fair market value of the farm, with the improvements, in your judgment, before the war?

A. I declined to bid $25,000 for it.

Q. When?

A. In 1856. I think that was the year Mr. Ramsdell purchased; it was at the sale at which he purchased, that I declined to buying at at that. I think it was 1856; I will not be positive, sir.

Q. Were all the improvements—all that have been referred to by Mr. Bigler—then on the farm?

A. All were on the firm, sir.

Q. What was it then bid in for, at public sale?

A. $25,000.

Q. What was the value of the farm in May, 1865, in your opinion?

A. I offered Mr. Bigler $20,000 for it, if he would take this claim. He offered it to me at $25,000, which I refused to give; he offered it to me for $20,000 in his letter of December 4, 1865. I told him I would take the farm at that rate, if he would take this claim on payment, as far as it would go.

408 Q. What were your relations to Matt. Waller?

(Objected to, and taken subject to objection.)

A. He was my double first cousin, his father and my father being brothers, and his mother and my mother being sisters; he was raised by my mother, and I know that if he had had any intention of buying that farm, he would have come to me first.

Adjourned to Friday next, at 10 a. m., for summing up.

Referee's report.

The case having been summed up, the referee made his report as follows:

Supreme Court.

WILLIAM WALLER
against
JAMES BIGLER.

To the Supreme Court:

I, Luther R. Marsh, to whom this action was, by order of the court, referred, as sole referee, to hear and decide the same, do respectfully report:

That I have been attended, on the trial of this action before me, by the parties and their counsel, and have heard the proofs, arguments, and allegations of the respective parties, and, having duly considered the same, I do find and report as matters of fact:

First. That the plaintiff and defendant entered into the written
409 agreement set forth in the answer in this action on the second day of April, 1853, and that the same was not changed by any subsequent agreement.

Second. That in pursuance of said agreement the plaintiff, on the 10th of May, 1853, executed and delivered to the defendant a deed of the premises referred to in said agreement.

Third. That on delivery of said deed defendant paid the plaintiff $5,000 in cash, and gave the bond in suit, set forth in the complaint, for balance of the purchase price, viz, $25,000.

Fourth. To secure payment of said bond, the defendant executed and delivered to one Robert Saunders a deed of trust dated June 22d, 1853, of which the following is a copy, viz:

This deed, made on the twenty-second day of June, in the year eighteen hundred and fifty-three, between James Bigler, of Newburgh in the State of New York, and Harriet E. Bigler, his wife, of the one part, and Robert Saunders, of Williamsburgh, in the State of Virginia, of the other part, witnesseth. That the said James Bigler, and Harriet E., his wife, do grant unto the said Robert Saunders the following property, to wit: a tract of land in York County, Virginia, called Ripon Hall, which tract of land is described in a deed dated on the tenth day of May, 1853, from William Waller, of Williamsburgh, in Virginia, to the said James Bigler, which deed is recorded in the court of the said county of *New* York, and to which deed reference is made for the description, in trust, to secure to the said William Waller the purchase-money remaining due for the said tract of land, which purchase-money, so due, is $25,000, according to the contract between the said Bigler and the said Waller, as follows, to wit: two thousand dollars (or more at the option of the purchaser) at the expiration of two years from the 10th of May, 1853; and annually thereafter one thousand dollars (or more at the option of the purchaser) until the whole twenty-five thousand
dollars shall be paid; it being, however, distinctly understood
410 that the whole of the said amount of twenty-five thousand dollars is to be paid within, or at the expiration of, ten years from the 10th of May, 1853, so that whatsoever sum shall remain unpaid on the 10th of May, 1863, shall then be due and payable to the said Waller by the said Bigler. It is understood that the interest at the rate of six per centum per annum, which may be due at the end of any and every year, on the whole principal amount then due, shall be paid at the end of such year, and that otherwise such a defalcation shall be considered to have been made by the said Bigler as shall authorize the said Waller to require the said Saunders to execute this trust according to

law. And the said James Bigler, doth covenant to and with the said Robert Saunders that he, the said Bigler, will warrant generally the property hereby conveyed to the said Robert Saunders, his heirs and assigns forever.

It is further understood that a failure on the part of the said Bigler to pay the sum of two thousand dollars on the tenth day of May, 1855, or a like failure to pay at least one thousand dollars annually thereafter, with interest as aforesaid, shall be considered a defalcation on the part of the said Bigler, at any one of the periods referred to; as shall a failure to pay the amount remaining due on the tenth day of May, 1863, with interest; and that any such defalcation occurring at any one of the periods mentioned shall be sufficient to authorize the said Waller to require the said Saunders to execute this trust according to law.

Witness the following signatures and seals:

It is understood, and this addition was made before the execution of this deed, that in case of a sale the trustee shall give sixty days' notice in newspapers in Richmond, and in the city of New York.

J. BIGLER. [L. S.]
HARRIET E. BIGLER. [L. S.]
ROBERT SAUNDERS, *Trustee.* [L. S.]

411 Fifth. That up to and including the tenth day of May, 1860, the defendant had paid the plaintiff, on account of said bond, the sum of $12,000 and interest.

Sixth. That on the tenth day of May, 1861, there remained unpaid on said bond the further sum of $1,000, payable by the terms thereof and of said deed of trust, which the defendant failed to pay; and that the whole amount of said bond, by such failure, according to its terms and said deed of trust, thereupon became payable, viz, the sum of $13,000.

Seventh. That the defendant entered into the possession of said premises under said deed and agreement, and expended large sums of money in making and erecting improvements thereon, and erecting buildings thereon, amounting in the whole to at least the sum of $100,000.

Eighth. That the defendant had offers from several parties, who desired to make purchases of part of said premises, and who offered to pay the defendant $300 per acre for such portions as should be purchased by them, and released from the lien of said deed of trust.

Ninth. That said defendant applied to the plaintiff to release such portion from the lien of said trust deed, which said plaintiff refused to do.

Tenth. That said defendant would have realized from such sales, had he been permitted to make the same, the sum of $3,000; and that he offered to pay the whole of the proceeds of such sales to the plaintiff, to be applied on said bond; and that the balance of said premises would have afforded ample security for the liquidation of the residue of the debt due.

Eleventh. That said plaintiff afterwards caused a pretended sale, at public auction, of said premises, to be made under said trust deed, by said Robert Saunders, on the first day of April, 1862; and that, at said sale, said plaintiff bid in and became the nominal purchaser of said premises, at and for the price of $17,000, bidden by him therefor;

412 and that for the balance of said purchase-money, over the amount due on said bond, said plaintiff gave his note to said trustee, and that said Saunders, as such trustee, thereupon executed and delivered to said plaintiff a deed purporting to convey said premises to him, in

pursuance of said sale and the terms of said deed of trust, which was accepted by him.

Twelfth. That no notice of such sale was ever published in any of the papers published in the city of New York, as required by said deed of trust.

Thirteenth. That said sale was made on said premises, and said plaintiff attended said sale on said premises, and bid for the same, as aforesaid, at said sale.

Fourteenth. That after such pretended sale, said plaintiff always claimed and insisted that he was the owner of said premises, and that he had derived title thereto by said sale and deed from said trustee to him, and claimed title thereto in opposition to the defendant, and notified the defendant that he had purchased said land, and should contest his claim thereto; and that said plaintiff received the sum of $3,000, in confederate money, from the rebel or confederate authorities, for the use and occupation of said premises by them; and that said plaintiff disposed of part of the personal property on said premises, and exercised various acts of ownership over said premises, and offered the same for sale, and endeavored to sell the same; and said defendant was deprived of, and unable to obtain, possession of said premises until May, 1865.

Fifteenth. That after such sale, and while said premises were, constructively, in the possession of said plaintiff, the greater part of the buildings and improvements erected thereon by the defendant were burned and destroyed by the rebel military authorities, and property to the value of at least $75,000 was destroyed thereby.

Sixteenth. That, at the time of the said sale, the annual value of said premises and improvements amounted to the sum of $5,000.

413 And, as conclusions of law, from the facts aforesaid, I do find and report:

First. That said plaintiff violated the terms of said agreement to be performed on his part, in that he refused to release such portions of said premises as said defendant desired to sell as aforesaid, and that said defendant sustained loss and damages by said refusal to the amount of $3,000, with interest thereon, at the rate of six per cent. per annum, from the spring of the year 1854, which sum said defendant is entitled to counter-claim against the claim of the plaintiff in this action.

Second. That said sale, by said trustee, not being advertised in the manner required by said trust deed was irregular and void, and conferred no title upon said plaintiff.

Third. That between the time of said sale by said trustee, viz, April 1st, 1862, and the month of May, 1865, said premises were, and continued, constructively and in law, in the possession of said plaintiff.

Fourth. That said plaintiff is thereupon liable to the defendant, and is bound to account to him for the rental value of said premises during the period of said plaintiff's possession thereof, as aforesaid, at the rate and value of the same when he first took possession, viz, at the rate of $5,000 per year.

Fifth. That such rental value, during such possession by the plaintiff, amounting to the sum of $15,000, for three years, is a valid and existing claim in favor of the defendant against the plaintiff, and said defendant is entitled to counter-claim and offset the same against the claim of the plaintiff in this action.

Sixth. That said claims in favor of the defendant against the plaintiff, amounting together to more than the claim of the plaintiff, he is not entitled to recover anything in this action.

414 Seventh. That, on the merits, judgment shall be rendered in

this action in favor of the defendant against the plaintiff, dismissing the complaint, with costs.

All which is respectfully submitted.

Dated New York, Sept. 28th, 1867.

(Signed) LUTHER R. MARSH, *Referee.*

Notice of exceptions.

New York supreme court, city and county of New York.

WILLIAM WALLER }
vs.
JAMES BIGLER. }

The above-named plaintiff excepts to the report of the referee in this action, both upon the facts found and his decisions of law therein; he further excepts, specially, to each and every following portion of said report:

First. To the first finding of fact, that the plaintiff and defendant entered into the written agreement set forth in the answer in this action on the 2d day of April, 1853, and that the same was not changed by any subsequent agreement.

Second. To the second finding of fact, that, in pursuance of said agreement, plaintiff, on the 10th day of May, 1853, executed and delivered to the defendant a deed of the premises referred to in said agreement.

Third. To the fourth finding of fact, that to secure payment of said bond, the defendant executed and delivered to one Robert Saunders a deed of trust, dated 22d June, 1853, of which the following is a copy, viz:

415 This deed, made the twenty-second day of June, in the year eighteen hundred and fifty-three, between James Bigler, of Newburgh, in the State of New York, and Harriet E. Bigler, his wife, of the one part, and Robert Saunders, of Williamsburgh, in the State of Virginia, of the other part, witnesseth: That the said James Bigler and Harriet E., his wife, do grant unto the said Robert Saunders the following property, to wit, a tract of land in York County, Virginia, called Ripon Hall, which tract of land is described in a deed, dated the 10th day of May, 1853, from William Waller, of Williamsburgh, in Virginia, to the said James Bigler, which deed is recorded in the court of the said county of York, and to which deed reference is made for the description, in trust, to secure to the said William Waller the purchase-money remaining due for the said tract of land, which purchase-money, so due, is twenty-five thousand dollars, according to the contract between the said Bigler and the said Waller, as follows, to wit, two thousand dollars (or more at the option of the purchaser) at the expiration of two years from the 10th of May, 1853, and annually thereafter one thousand dollars, (or more at the option of the purchaser) until the whole twenty-five thousand dollars shall be paid; it being, however, perfectly understood that the whole of said amount of twenty-five thousand dollars is to be paid within, or at the expiration of, ten years from the tenth day of May, 1853, so that whatsoever sum shall remain unpaid on the 10th of May, 1863, shall then be due and payable to the said Waller by the said Bigler. It is understood that the interest, at the rate of six per centum per annum, which may be due at the end of any and every year, on the whole principal amount then due, shall be paid at the end of such year, and that otherwise, such a defalcation shall be considered to have been

made by the said Bigler as shall authorize the said Waller to require the said Saunders to execute the trust according to law. And the said James Bigler doth covenant to and with the said Robert Saunders, that he, the said Bigler, will warrant, generally, the property hereby
416 conveyed to the said Robert Saunders, his heirs and assigns, forever. It is further understood that a failure on the part of the said Bigler to pay the sum of two thousand dollars on the 10th day of May, 1855, or a like failure to pay at least one thousand dollars annually, thereafter, with interest, as aforesaid, shall be considered a defalcation on the part of the said Bigler at any one of the periods referred to, as shall a failure to pay the amount remaining due on the 10th day of May, 1863, with interest, and that any such defalcation occurring at any one of the periods mentioned, shall be sufficient to authorize the said Waller to require the said Saunders to execute the trust according to law. Witness the following signatures and seals. It is understood, and this addition was made before the execution of this deed, that, in case of a sale, the trustee shall give sixty days' notice in newspapers in Richmond and in the city of New York.

J. BIGLER. [L. S.]
HARRIET E. BIGLER. [L. S.]
ROBERT SAUNDERS, *Trustee.* [L. S.]

Fourth. To the seventh finding of fact, that the defendant entered into possession of said premises under said deed and agreement, and expended large sums of money in making and erecting buildings thereon, amounting, in the whole, to at least $100,000.

Fifth. To the eighth finding of fact, that the defendant had offers from several parties who desired to make purchases of part of said premises, and who offered to pay the defendant $300 per acre for such portions as should be purchased by them, and released from the lien of said trust deed, which said plaintiff refused to do.

Sixth. To the ninth finding of fact, that the defendant applied to the plaintiff to release such portion from the lien of said trust deed, which said plaintiff refused to do.

Seventh. To the tenth finding of fact, that said defendant would have realized from such sales, had he been permitted to make the same,
417 the sum of $3,000; and that he offered to pay the whole of the proceeds of such sales to the plaintiff, to be applied on said bond; and that the balance of such premises would have afforded ample security for the liquidation of the residue of the debt due.

Eighth. To the twelfth finding of fact, that no notice of such sale was ever published in any of the newspapers published in the city of New York, as required by said trust deed.

Ninth. To the fourteenth finding of fact, that, after such pretended sale, said plaintiff always claimed and insisted that he was the owner of said premises, and that he had derived his title thereto by said sale and deed, from said trustee to him, and claimed title thereto in opposition to the defendant, and notified the defendant that he had purchased said land, and should contest his claim thereto; and that said plaintiff received the sum of $3,000, in confederate money, from the rebel, *of* confederate authorities, for the use and occupation *or* said premises, and exercised various acts of ownership over said premises, and offered the same for sale, and endeavored to sell the same; and said defendant was deprived of, and unable to obtain, possession of said premises until May 1865.

Tenth. To the fifteenth finding of fact, that, after such sale, and while

said premises were constructively in the possession of said plaintiff, the greater part of the buildings and improvements erected thereon by the defendant were burned and destroyed by the rebel military authorities, and property to the value of $75,000 was destroyed thereby.

Eleventh. To the sixteenth finding of fact, that, at the time of said sale, the annual value of said premises and improvements amounted to the sum of $5,000.

Twelfth. To the first conclusion of law, that said plaintiff violated the terms of said agreement to be performed on his part, in that he
418 refused to release such portions of said premises as defendant desired to sell, as aforesaid, and that said defendant sustained loss and damage, as by said refusal, to the amount of $3,000, with interest thereon at the rate of six per centum per annum from the spring of the year 1854, which sum said defendant is entitled to counter-claim against the claim of the plaintiff in this action.

Thirteenth. To the second of said conclusions of law, that said sale, by said trust deed, was irregular and void, and conferred no title upon said plaintiff.

Fourteenth. To the third of said conclusions of law, that between the time of said sale by said trustee, viz. April 1st, 1862, and the month of May, 1865, said premises were, and continued, constructively and in law, in the possession of said plaintiff.

Fifteenth. To the fourth conclusion of law, that said plaintiff is thereupon liable to the defendant, and is bound to account to him for the rental value of said premises, during the period of said plaintiff's possession thereof, as aforesaid, at the rate and value of the same when he first took such possession, at the rate of $5,000 per year.

Sixteenth. To the fifth conclusion of law, that such rental value, during such possession by the plaintiff, amounting to the sum of $15,000, for three years, is a valid and existing claim in favor of the defendant against the plaintiff, and said defendant is entitled to counter-claim, and offset the same against the plaintiff in this action.

Seventeenth. To the sixth conclusion of law, that said claim, in favor of the defendant against the plaintiff, amounting, together, to more than the claim of the plaintiff, he is not entitled to recover anything in this action.

Eighteenth. To the seventh conclusion of law, that on the merits, judgment should be rendered in this action in favor of the defend-
419 ant, against the plaintiff, dismissing the complaint, with costs.

Dated New York, November 4th, 1867.

ALGERON S. SULLIVAN,
Plaintiff's Attorney, 29 Wall Street, New York.

To LUTHER R. MARSH, Esq.,
Referee, 170 Broadway, New York.
ENOCH L. FANCHER, Esq.,
Defendant's Attorney, 229 Broadway, New York.

New York supreme court.

WILLIAM WALLER
versus
JAMES BIGLER. } Judgment October 17, 1867.

The issues of fact in this action having been, by an order of this court referred to Luther R. Marsh, esq., counsellor at law of the city of New

York, as sole referee to hear and decide the whole issues, and the same having been tried before said referee, who, on the 28th day of September, 1867, made his report, whereby he decides that the complaint of the plaintiff in this action be dismissed with costs, and that judgment should be rendered in favor of the defendant against the plaintiff for his costs of this action, and such costs having been adjusted on notice (including $500 additional allowance granted by the court) at the sum of $1,004 77.

420 Now, on motion of E. L. Fancher, esq., attorney for defendant, it is adjudged that the complaint of the plaintiff in this action be, and the same is, dismissed with costs; and that James Bigler, the defendant, recover of William Waller, the plaintiff, the aforesaid costs, disbursements, and allowance, amounting in the whole to the sum of one thousand and four dollars and seventy-seven cents, ($1,004 77,) and that the defendant have execution therefor.

New York supreme court, city and county of New York.

WILLIAM WALLER
versus
JAMES BIGLER.

GENTLMEN: You will please take notice that the plaintiff, William Waller, appeals to the general term of this court from the judgment entered in the above-entitled action on the seventeenth day of October, 1867, in favor of the defendant, for the sum of $1,004 77, costs upon the report of the referee therein.

Dated New York, November 4th, 1867.

Yours, &c.,

ALGERNON S. SULLIVAN,
Attorney for Plaintiff, 29 Wall Street, N. Y.

To E. L. FANCHER, Esq.,
Attorney for Defendant.
W'M C. CONNER, Esq.,
Clerk of the City and County of New York.

421 Some of the exhibits in this case having been lost, it was agreed that such exhibits as are now in the possession of the respective parties should be printed at the end of the case.

Plaintiff's Exhibit, No. 1.

NEWBURGH, *March 9th*, 1866.

W'M WALLER, Esq., *Lynchburgh, Va.*

DEAR SIR: Your favor of the 12th February I find on my return home. In answer I would say, as all the papers are here, and my wife not being able to take so long a journey to execute the papers, it will be necessary for you to come on to carry out the acceptance of my proposition of the 20th December to you, for the purchase of my property on York River, although I can now sell the property for a much larger price to some parties from Massachusetts, who are very anxious to purchase the whole property, and have offered me $30,000, and I think will give much more; but as I have made you the offer I will give you to the 20th inst. to carry out this trade.

Yours truly,

J. BIGLER.

Plaintiff's Exhibit, No. 2.

$25,000.

This paper witnesseth that I, James Bigler, of the State of New York, a resident of Newburgh, in that State, am indebted to William Waller in the sum of twenty-five thousand dollars, which I promise to pay within ten years after this date, and at the periods of time specified in a contract drawn up and signed by myself, through my agent, Mr. Th. Hammond, and by William Waller in his own behalf; and I further promise and bind myself and legal representatives, to pay interest
422 on this debt of twenty-five thousand dollars, at the rate of six per centum per annum, punctually at the expiration of each year.

Witness my hand and seal this tenth day of May, one thousand eight hundred and fifty-three.

J. BIGLER. [L. S.]

Plaintiff's Exhibit, No. 3.

This deed, made on the second day of April, eighteen hundred and sixty-two, between Robert Saunders (trustee) of the first part, and William Waller of the second part, witnesseth that, whereas on the 22d day of June, 1853, James Bigler and Harriet E. Bigler his wife, then, and at this date, of the State of New York, did grant unto the said Robert Saunders, of Williamsburgh, in the State of Virginia, a certain tract of land in York County, Virginia, called "Ripon Hall," now commonly called "Bigler's," (for the description of which land reference is hereby made to the deed just mentioned,) in trust to secure to the said William Waller certain sums of money mentioned in the said deed, due to the said Waller from the said James Bigler, as the purchase-money for the said land, which had been sold to the said Bigler by the said Waller, and conveyed and granted to the said Bigler by the said Waller, by deed dated on the tenth day of May, 1853; which deed, as also the deed of trust just mentioned, is on record in the clerk's office of the county court of the said county of York; and whereas, the said Bigler having made default in the payment of the instalment mentioned and described in the deed of trust aforesaid, due to the said Waller on the tenth day of May, 1861, (the residue of the purchase-money still remaining due,) and the trustee having been required to execute the trust, as by the terms of the deed of trust the said Waller had the right to require the said trustee to do, the said Robert Saunders, trustee as aforesaid, did, on the first day of April, 1862, after having advertised the time and place of sale, and all other things necessary to be
423 advertised according to the stipulations of the deed of trust aforesaid, sell on the premises, at public aution, the land conveyed in the deed of trust aforesaid, with the following exceptions and on the following terms, viz: the land so sold consisted of the whole tract so conveyed, called "Ripon Hall," and lately called "Bigler's," except so much thereof as had been theretofore released by the said Waller, being one hundred and fifty acres, more or less, the evidences of which release are recorded in the clerk's office before mentioned; and further, except two pieces or parcels of the said tract, one of them containing about sixty-four acres, being the piece contracted to be sold by the said Bigler to Knapp, and the other, containing about one hundred and twenty acres, being the piece contracted to be sold by the said Bigler to Darrah, and to Ferris; and the terms were: In cash, so

much as would pay the expenses of executing the trust; and eighteen hundred and thirty-three dollars and thirty-three and one-third cents, due on the day of sale to the said William Waller; on the tenth day of May, 1862, seventeen hundred and twenty dollars, then payable to the said Waller; and on the tenth day of May, 1863, eleven thousand six hundred and sixty dollars, then payable to the said Waller, completing the purchase-money secured to him by the trust deed aforesaid; and as to all over the amounts just mentioned, a credit until the first day of April, 1864, with interest thereon from the day of sale; the purchaser to give satisfactory notes for the deferred payments, and a lien to be retained upon the premises sold for further security.

And whereas, at the sale just mentioned, there being more than one bona fide bidder, the land so sold was bought by the said William Waller at the price of seventeen thousand dollars. Now, in consideration of the premises, the said Robert Saunders, trustee as aforesaid, doth hereby grant and convey with special warranty, to the said William Waller, the land herein described as having been bought by him at the sale aforesaid, the same containing two thousand acres, more or less, always reserving, however, a lien to the said Saunders upon the land hereby
424 conveyed and granted to secure the payment to him by the said William Waller, of eleven hundred and sixty-five dollars and forty-one and two-thirds cents on the first day of April, 1864, with interest from the first day of April, 1862, that amount being the excess of the seventeen thousand dollars (purchase-money) over the several amounts above recited as being payable in cash, and on the tenth day of May, 1862, and on the tenth day of May, 1863, respectively; for which amount of eleven hundred and sixty-five dollars and forty-one and two-thirds cents, the said Saunders holds the note of the said Waller, dated on the same day with these presents.

Witness the following signature and seal.

RO. SAUNDERS, *Trustee.* [L. S.]

CITY OF WILLIAMSBURGH, *to wit:*

I, Ro. M. Garrett, a justice of the peace for the corporation aforesaid, in the State of Virginia, do certify that Robert Saunders, whose name is signed to the writing above, bearing date on the second day of April, 1862, has acknowledged the same before me in my corporation aforesaid.

Given under my hand this seventh day of April, 1862.

RO. M. GARRETT, *J. P.*

Plaintiff's Exhibit No 1, *of July* 23, 1867.

NEWBURGH, *December 4th*, 1865.

W'M WALLACE, Esq., *Lynchburgh, Va.:*

DEAR SIR: Your favor of the 29th of November is at hand. In reply to what you say about the estate on York River, I would say, I have expended on said property, including the purchase, over $150,000. I believe in less than ten years it will bring $75,000 to $100,000, but will sell it to you for $25,000, and give you time to pay it, if you wish; or I am perfectly willing to test our legal claims. Suit yourself.

Yours, &c.,

J. BIGLER

425 *Defendant's Exhibit D.*

LYNCHBURGH, *February* 12*th*, 1866.

JAMES BIGLER, Esq.:

DEAR SIR: Your letter was received a few days since, but severe indisposition has prevented a reply.

Although I do not beleive (from all I can learn of the condition of things in Williamsburgh and its vicinity) that land is selling at any price, still, to have a speedy settlement of our matters, I will consent to your offer of the land, as contained in your letter of the 20th December last. In order to effect this, your presence in Williamsburgh will be necessary, as the legal title to the land being in Mr. Saunders, (trustee,) it will have to be conveyed by him. You can only make a deed to the part relinquished by me. I wish it attended to as soon as possible. You can bring with you the deed for the portion of the estate in which the legal title vests in you. If anything prevents your coming, perhaps (I don't know) you can accomplish it by sending power of attorney to some lawyer; but of this you will advise yourself by consultation with your legal adviser.

I cannot forbear (I hope to do so in a proper spirit) allu'ing to your answer to the suit I was forced to bring against you. You state that I, in conjunction with others, expelled you from your estate. I assert, on the honor of a man, that when that alleged raid was made I was 250 miles distant, but was not in the army, as you allege. You again say that I, with at least three others, burned your mill. I again solemnly swear I was not in the army, nor anywhere near your premises at that time. You accuse me of a violation of the covenant. You must be aware that the moment you offered me a sum which I deemed sufficient to render the balance of the debt secure, I did release 150 acres, more or less. I know the latitude allowed to all defendants in law and chancery, and therefore have taken no offence, but was, I confess, a little surprised when I saw it.

426 However, let all this pass now and forever. Let us settle up our own matters. I will await your reply for a few weeks, before leaving for Williamsburgh.

Respectfully, yours,

W'M WALLER.

A copy.—Test'd.

W. H. BARRY, *Clerk.*

Defendant's Exhibit F.

LYNCHBURGH, *Jan'y* 14*th*, 1857.

JAMES BIGLER, Esq.:

DEAR SIR: More than twelve months since I wrote you, on the reception of your answer, that, in consequence of language employed in that document, our relations could not be otherwise than unfriendly. I certainly entertained at that time, and for months after, any other than kind impressions. Since then I learn that much latitude is allowed to both plaintiff and defendant in legal controversies, and, therefore, determined that, should we meet, I would take the initiative in speaking. Several weeks since an opportunity occurred, and you know I then addressed you by name. I see no reason why our matters cannot be settled, if we approach them in a business spirit, free from acrimony

and *jeleuze*. The loss of valued friends by death during the past year has much sorrowed me; and, should you meet me in a corresponding manner, I doubt not this whole controversy can be settled. I propose that we both lay our claims before some gentleman of honor well versed in the law. If he thinks and decides that I am morally or legally bound to pay for damages sustained by you during the war, I will comply with such decision. If what you heard about my receiving money for damages, for horses and mules *and mules* sold, for lumber and fruits, can be proved by any man, I will agree to refund all the
427 money, with interest. I know that I never received one cent from any such source or sources. Believing otherwise, I do not now blame you for your bill filed in the United States court; but if you were deceived by others, and your charges are erroneous, surely it is the part of an honorable man to retract them. This I submit to you. If my connection with the army of the Southern States (I was with the army from June, 1861, to February, 1862,) rendered me in law or morals liable for injury done you, then, too, I am willing to abide the referee's award. I resigned in February, 1862, and was no time after a commissioned officer, but a private citizen. During the occupation of the peninsula by General Johnston the estate was in the hands of the military. I saw it was rapidly going to ruin. The district attorney denied my right to the land, he claiming it as belonging to the Confederate States; and I was driven to the expense and necessity of taking the question before Judge Haliburton, who decided that the deed of trust gave me a better claim than any which could result from a state of war. I then authorized Mr. Saunders to sell, and purchased it solely that I might protect it from the depredations of the military. In one month after this Gen. McClellan took possession of the peninsula, and I saw no more of the peninsula until May, 1865. Not one cent did I receive from my trustee; not one particle of timber or fruit did I ever sell, and from the Confederate States authorities not one dime. If you have heard otherwise, I challenge the proof, and will submit it all to arbitration. But you seem to think I was of the party who were alleged to have committed depredations. If I do not satisfy you by incontestable evidence that I was at no moment during the year '61 on the estate, then I will agree to pay damages to you. My sole object in selling and purchasing the estate was to secure it from further injury, and I distinctly declared at the time of sale that the land was yours at the close of the war. This fact I will substantiate by witnesses of unblemished reputation. Then, what are the points of difference between us? You were deprived of the use of your farm. If I did this, then I am willing to be held responsible. I was also deprived of the use of money due me. Now let this whole matter be arbitrated and settled.

428 If, however, there be any other plan to be suggested, I am willing to give to it serious reflection. If you meet this in a spirit similar to my own, then this whole difficulty can be overcome. I will await your reply.

Respectfully, yours,

W'M WALLER.

A copy.—Test:

W. H. BARRY.

(Indorsement on cover:) No. 352. James Bigler, appellant, vs. William Waller and Robert Saunders. Virginia. C. C. U. S. Filed 7th December, 1870.

Supreme Court

OF THE UNITED STATES.

JAMES BIGLER,
PLFF. AND APPLT.,

VS.

WILLIAM G. WALLER,
ADMR.,

AND

MOSES HARRELL,
COM. AND ADMR.

Argument for Appellant.

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JAMES BIGLER,
Plaintiff, Appellant,

vs.

WILLIAM G. WALLER, Administrator, &c., of William Waller, and MOSES R. HARRELL, Administrator & Com. of Robert Saunders,
Respondents, Defendants.

Brief and Points for Appellant.

STATEMENT OF FACTS.

This suit was brought by James Bigler, of New York, against William Waller and Robert Saunders, of Virginia, to have a certain *bond* (and *trust deed* in the nature of a mortgage) decreed to have been paid.

The statements contained in the pleadings, material to the issues raised by this appeal, are as follows:

Bigler avers in his bill, that on the 2d day of April, 1853, by his agent, F. W. Hammond, of Virginia, he

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2 5[1] made an agreement[1] in writing with William Waller, to
6 17[1] purchase of him for $30,000 "Rippon Hall" estate, consisting of about 2,400 acres.

It contained the following covenant:

"Said Waller will allow said Bigler to sell such portion of the land as he may see fit, from time to time; the said Bigler paying over to said Waller such proceeds of sales as will afford ample security for the liquidation of the residue of the debt."

2 6[3] That on the 10th day of May, 1853, Bigler paid[3]
7 23[3] $5,000 of the purchase money, gave his bond[3] for the
6 20[4] balance, $25,000, took a deed[4] of the property, and at the same time took possession of the estate.

That on the 22d day of June following, Bigler made
2 6[5] and delivered a trust deed[5] to one Robert Saunders to
7 24[5] secure the payment of the bond, which deed provided for the sale, under a Virginia statute, of the estate in default of payment according to the terms of the bond.

2 6[6] That the plaintiff made improvements[6] on the estate, consisting of a wharf, mills, hotel, store, church, schoolhouses, laid out a village and built a large number of private residences, prior to the late war, at an expense of $150,000.

That in the spring of 1854, Bigler contracted to sell
3 7[7] portions[7] of said estate (village lots), but was prevented from effecting such sales by Waller's refusal to release the mortgage lien, which refusals damaged Bigler to a large amount.

That Bigler fulfilled[7] his agreement until May 10th, [illegible] paid on the bond,

of the original purchase money, to be paid or offset against the loss from Waller's failure to release.

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Prior to March, 1862, the rebel army had taken possession of the estate, when, on or about the 1st day of March, 1862, Waller then being an officer of the Confederate Army, *caused the trust to be executed*[1] *and a sale of the estate to be made at public auction on the premises, and bought it in himself for* $17,000; *took a deed thereof from the trustee Saunders, canceled the bond* ($13,000) *and gave his notes for the balance of the* $17,000 *purchase money.*

[1] 13 7

That Colonel Drake, an officer of the Confederate Army (Waller's lessee) burned[2] two mills and a wharf worth $25,000, May 2d, 1862, and greatly injured the houses and orchards. This waste occurred a month after Waller's purchase and possession.

[2] 13 9

That Waller thereafter collected[3] the rent, disposed of the personal property and settled[3] with the Confederate Government for the waste committed by them while they were in possession thereof, which damage amounted to more than thirty thousand dollars.

[3] 13 8, 9

That Waller sold[4] the estate during the war.

[4] 13 9

The prayer was for an injunction[5] against another execution of the trust, or any further proceedings[5] on this bond, and to have it declared satisfied.[5]

[5] 15 14, 15

The material portions of Waller's answer were as follows:

He admits[6] Bigler's purchase, payments and trust, but avers[6] that his (Waller's) covenant to release was modidified subsequent to the purchase, and not broken[6] thereafter by him.

[6] 17 56, 57

Waller admits[7] that he *caused the trust to be executed and that he purchased the premises,* but avers that he

[7] 18 57, 58
19 60

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never took possession; that Bigler had abandoned the estate; that the rebel forces were in possession, and that he foreclosed to divest the Confederate forces and to protect the property, and also for fear that it might depreciate below his mortgage debt.

Waller also avers that he intended at the time of purchase, and has since offered,[1] to *reconvey* the same to Bigler on payment of bond.

19 60[1] Waller denies[1] that he has received any compensation for damage done to the premises.

19 61[2] Waller admits[2] that he tried to sell the estate during the war, *i. e.*, his title, and denies the other allegations of the bill.

20 65[3] Defendant Saunders answers,[3] in substance:

That he was only a trustee.

20 66[4] *That he sold*[4] *the property in* 1862, *under the trust, at Waller's request.*

That Waller bid it in for $17,000.

That he (*Saunders*) *deducted the amount of the aforesaid bond therefrom, and took Waller's notes for the balance.*

That Waller did not take possession.

His other averments and denials are not material.

At the May term of the Circuit Court for the District
24 78[5] of Virginia, this cause was referred[5] to George Chahoon, Esq., a Commissioner of U. S. Court, to state an account between the parties of what was due to Waller on the bond, and of the offsets in the nature of waste, rent and damages, due from Waller to Bigler; also to make such recommendations as he might think

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The Commissioner attended to his duty, and filed his report[1] in the Clerk's office on the 2d day of November, 1867. [1]25 82

Account[2] "A" in said report finds $13,000 with interest, to be unpaid on the bond.

Account[2] "B" in said report finds $43,000 with interest, to be due from Waller to Bigler on account of damage, waste and rent. [2]26, 27

Statement[2] "C" shows a balance of $26,186 due from Waller to Bigler, for which judgment should be entered in favor of Bigler.

Said report recommends[3] that said bond be cancelled, and Waller and Saunders execute a release deed to Bigler of all claims to the land. [3]26 84

On the 2d day of November, 1867, exceptions[4] to the report of Com. Chahoon were filed by William Waller, and on the 26th day of November, 1867, the cause was set down[5] for hearing for the 20th day of December following. [4]27 91

The issues herein were argued in writing by the respective counsel for both parties, and a final decree entered[6] therein in accordance with Chahoon's report, January 7th, 1868. [6]54 170,2,3

Thereafter on the 12th day of March, 1868, the decree was set aside[6], and a re-hearing ordered for the May term, 1868. [6]55 176

On the 18th day of February, 1869, the death of Robert Saunders being suggested,[7] the suit was revived in the name of Moses E. Harrell, committee, and administrator of Robert Saunders. [7]55 177

On the 7th day of May, 1870, the death of William

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73 230[1] Waller being suggested,[1] the cause was ordered to proceed in the name of William G. Waller, his administrator.

On the 17th day of May, 1869, the cause was con-
56 181[2] tinued,[2] to await the decision of a certain action between the parties pending in New York.

The cause was afterwards reheard by his Honor the Chief Justice, who decided substantially as follows:

77 245[3] That Waller purchased[3] under the trust during the war, and was entitled as such purchaser to the possession, but not liable for the waste done to the premises, nor entitled to interest[3] on the bond during the war;
78 247[4] nor bound to pay damages[4] for not releasing; that Big-
76 241[5] ler was liable[5] for the amount of the bond, and entitled
78 247[6] to recover[6] $151.88 damages received by Waller of C. S. A. authorities.

POINTS.

I. This cause has proceeded on an erroneous assumption from the time it was first decided by Com. Chahoon:

The *assumption* that *Waller's foreclosure, in* 1862, *was a nullity, and that the property is now Bigler's, is an error.*

We contend that the *estate does not belong to Bigler, but belongs to Waller, under his forcclosure in* 1862.

Hence the bond has been satisfied by the sale under the trust, and there is about $1,100 and interest thereon of the purchase money under the foreclosure still due Bigler, for which Waller is liable.

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1. The averments in the pleadings, bearing on this foreclosure, are as follows:

Bigler says:

"Said Waller authorized said Saunders, as said trustee, to make sale of said real estate, which sale the said Saunders effected, * * * and out of the proceeds of said sale of said estate satisfied said bond of your orator, marked "C." 8 7

William Waller answers:

"That he did require the sale of the land; * * * this respondent (Waller) bought the land, but never took possession of it. 18 57 18 58

The defendant (Waller) further avers that the sale was made under the deed of trust."

The defendant (Waller) further says:

"He did purchase the estate in April, 1862, for the sum of $17,000." 19 62

Saunders answers as follows:

"*First:* According to the instruction and requirement of Waller, he did, on the first day of April, 1862, sell the real estate mentioned in the bill by public auction, on the premises, that is to say, he sold all of said real estate except what had been as above said previously released to Bigler, and except one or two other parcels of the land which had been contracted to be sold by Bigler to certain parties. The latter exception was by express direction of Waller, who declared that he did not wish to interfere with the contracts existing between Bigler and the purchasers if the remainder of the land *should suffice to pay the debt.* The quantity of land embraced in this exception was, as well as this respondent recollects, about two 21 65 21 66

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hundred acres. The land sold was knocked down to Waller, he being the highest bidder, for the sum of $17,000.

Second. In reply to the second interrogatory this respondent says, that he made a deed of conveyance, as trustee, to Waller, for the land sold, took his receipt for $15,834.58⅜, and his note (which he now holds) for $1,165.41⅝, that being the remainder of the $17,000, after paying debt and costs of executing trust."

2. The evidence is as follows:

Waller swears:

140 355
140 356

"I instructed Mr. Saunders to sell. It was advertised in February, and sold in April. * * * I ordered it to be sold by letter.

Q. Were you present on the farm at the day of the sale?

A. I was, sir.

Q. Did you bid it off?

A. I did, sir.

Q. For how much?

A. * * * It was $17,000.

A. * * * I am positive it was $17,000.

130 338

Q. * * * To the trustee, you gave directions to sell?

130 339

A. Yes, sir.

Q. You determined to sell the land, did you?

A. Yes, sir.

Q. You told him to foreclose the trust deed?

A. I told him to sell, to advertise, which he did; that sale was in April. * * *

Q. You bought it in?

A. Yes, sir."

Waller's purchase under the trust is admitted on almost every page of his testimony, and

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Knapp stood by and saw it accomplished. He swears as follows:

"Q. Were you personally on this place in March, 1862, when there was a pretended sale under a trust deed? 88 270

A. Yes.

Q. Did you see the plaintiff, William Waller, there?

A. Yes, sir.

Q. Who else was there?

A. Mr. Saunders, besides a good many other parties.

Q. What happened at the sale; was the place put up and sold?

A. Yes, sir.

Q. Who purchased it; who bought it in?

A. Mr. Waller."

3. Waller claims all through his testimony that he bought the estate at the trust sale, but now avers as his *excuse* that he *intended* to reconvey it to Bigler, if Bigler would pay the bond.

(1.) This *intent* is an afterthought and a *false pretence*, as shown by Waller's words:

"My only object in bidding was to secure my debt." 140 355

Also by what he told Saunders, when he required him to sell—not to disturb existing contracts if the "remainder of the land should suffice to pay the debt." 21 66

(2.) More especially by his acts in thereafter selling the property.

Goddin, (real estate broker, Richmond, Va.,) swears:

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35 118 "Q. During the war, did you offer for sale any real estate for Mr. Waller?

A. I did; at the request of Mr. Waller, sometime during the latter part of the year 1863, I sold his farm on York river, called Bigler's, to Mr. James B. Jones and Peter W. Grubbs, for, if I recollect, $60,000 in Confederate treasury notes. After the sale was made and deed executed, it was found that it conveyed a *special* instead of what the purchasers required, a *general* warrantee. After a good 'eal of correspondence and negotiation, the purchasers insisting that they should have a general warrantee, * * * the sale was, by mutual consent, cancelled."

131 339 (3.) In settling with the Rebel Government.

(4.) His *intent* is also shown by the fact, that he tried to trade off what was left of the personalty.

131 340 Waller said: "I wish very much you (Knapp) could bring it (saw-mill) up here, and I will sell it."

(5.) *He exercised every act of dominion over the property, during the next four years, possible, to the absolute owner, under the then existing condition of that portion of the Country.*

4. After the war he strenuously claimed that his title under the trust sale was good.

132 341 Waller said: "I had bought the farm and intended to surrender it to Bigler whenever he paid for it."

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Southard says: "He (Waller) said that he had bought it under the trust deed, and that he claimed the ownership of it; claimed that it belonged to him; that it was his."	154	381
	156	385
He claimed same thing to Bigler the only time he saw him since.	160	391
	112	308
	114	311
	114	312

Waller had the trust executed under the Virginia Statute, and the regularity of his proceedings is not questioned.

(*Va. Code of* 1860, *p.* 562, *sec.* 6.)

5. Bigler repudiates this pretended agency, admits the validity of the trust sale and Waller's purchase April, 1862; is willing to confirm it; elects to consider himself sold out, but asserts that the bond is paid and satisfied.

6. The property itself is free from all incumbrances made since the trust sale.

If it were not this *pendente lite* would protect it as to either party.

(4 *Johns. Ch. R.*, 556.)

Waller is estopped by his pleadings and evidence from denying his purchase and title.

He is estopped from denying his title by his deed, which he accepted.

The only irregularity in regard to the trust proceedings, (viz., failure to advertize in New York,) is one which Waller and Saunders *excuse* and Bigler does not raise. Bigler has power to waive it. Besides, the war, and non-intercourse Act, made Waller's excuse valid.

7. Therefore, Bigler says:

Let Waller have his estate; pay me what he agreed to, under the trust sale, and damages for

his failure to release, and my costs, and that will end the matter.

Waller's pretence is that he bought in the property to protect it. This is only verbal, and never made in any form to be available by Bigler.

Waller's motive in buying the property is immaterial, the real question being as to the validity of his purchase.

His title must be considered good, since it is set up by all parties, and impeached by none.

II. But if the Court *will* compel Bigler to *retake* title to the property, then what *was* Waller's *relation* to the estate during the *interregnum*, and what *are* his responsibilities, if any, growing out of that relation?

1. What was Waller's relation to the property?
2. What is his responsibility incident to that relation?

1. It cannot be said that Waller's actual *relation* to the property was not sufficiently *intimate* to warrant his being said to be in *actual possession*.

(1.) For he regularly bought it, paid for it, and took a deed thereof. Possession follows the title.

(2.) He sold thereafter and conveyed it away (notwithstanding the sale fell through).

(3.) He undertook to dispose of the personalty left.

(4.) In fact he exercised all the acts of dominion over the property possible under the *then* condition of that portion of the country.

(5.) Waller took the *esplees* for four years.

In view of the cases hereafter cited, Waller could undoubtedly maintain the *ouster*, *eviction*, *adverse possession and disseisin*, as against Bigler, from April, 1862.

The doctrine of the Federal Courts as to what will constitute *actual adverse possession*, is found in *Smith's Leading Cases*, *vol.* 2, *p.* 641, 643, *m.* 566 *Sixth Am. Ed.*, *and cases there cited as follows:*

"So much depends on the nature and situation of the property, the uses to which it can be applied or to which the owner or claimant may choose to apply it, that it is difficult to lay down any precise rule adapted to all cases.

"But it may with safety be said that where acts of ownership have been done upon land which, from their nature, indicate a notorious claim of property in it, &c., such acts are evidence of an ouster of a former owner, and an actual adverse possession against him, if the jury shall think that the property was not susceptible of a more strict or definite possession than had been so taken and held; and the continued claim of property has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property he did not claim."

(5 Met., 33.)

"If one enters under a void grant, he is a disseisor."

(21 Conn., 413.)

"An entry and possession by a party under a claim of title in himself by virtue of a void grant, whether by parole or otherwise, is not less adverse than if possession were taken and held without any color of title whatever."

The New York rule is found in

Dewy v. *Osborn*, 4 *Cow.*, 338.

The English rule is found in the decisions cited in last case, *supra.*

The Am. doctrine in Kent, vol. 4, margin 482–3.

Upon these authorities, Waller could set up his *own* possession *against* Bigler; and if so, cannot Bigler set up the same possession *against* Waller?

Will the same facts prove one thing *for* a wrong doer, and not prove *as much* for the injured party?

Hence Waller had *actual possession* of the premises during the war, and was a disseisor, or, to put it in the language of

Robertson v. *Norris, Post.*,

He was a "trespasser and wrong-doer," a mortgagee who had obtained tortious possession.

2. What is Waller's liability as such disseisor, trespasser, or wrong-doer?

To begin with early authorities:

We learn from *Bracton, p.* 186, 187, *b*, *Britton, c.* 42, 44, and from *Reeve's History Eng. Com., Vol.* 1, *p.* 331, *et seq.* (old Ed. not quarto).

That a person wrongfully in possession of realty was liable to the rightful owner for all the damage done to the property while the wrong-doer was in possession. This was ordinarily found by the jury, who were allowed to find as much as *three times* the actual damage done.

The year books are full of these cases; cited margin of *Richard Liford's Case*, 11 *Coke*, p. 51.

Reeves' ante says: "for these reasons it was expected that the Justices should examine very carefully into the change that had been made on the land since the disseisin, either through the willfulness or neglect of the disseisor, *or any other wise;* all which he was to be compelled to make good, though much damage might have happened, by death of cattle and other accidents, which it was *out of his power to govern.*"

The ancient statutes of waste enacted substantially the same rule as to *termors.*

Subsequent to the Stat. of Marl., five different statutes of waste were passed, including the 11 H. 6; 6 E. 1, c. 5, 13; 13 E. 1, c. 22 (2 West.); 20 E. 1, c. 2; 9 H. 3, c. 4; giving "triple," "double," and actual damages against the holder of every possible estate except *disseisors* and *trespassers.*

Consequently, *disseisin* and *trespass* were mulct by the rule of the common law, and *termors* by the statute of waste (which was virtually the same rule); hence all disseisors, trespassers, and termors in possession of realty, were liable to the owner of the fee for all damage done to the property even for what was "beyond their power to govern."

It is interesting to note how the "triple damages" allowed by the common law melted away with the aggressions of that lawless age, until the time of Lord Coke, when actual damage was the rule.

There was the same decadence *pari passu* in the rigor of the statute rule as to termors, until at present "triple damages" hardly remain on the statute book.

We will now inquire what the consequences of disseisin are.

Lord Mansfield said in—

Taylor v. *Horde*, 1 *Burr* 110–112,

"The consequences of actual disseisin, considered as such, continue law to this day."

The Federal Courts have recognized the existence of this law.

Bradstreet v. *Huntington*, 5 *Pet. S. C. R.* 433. *Especially* 438 *et seq.*

The consequences of disseisin, to the disseisor, are a liability for *all waste* and for *mesne profits* made, *or which might have been made.*

Dewy v. *Osborne*, 4 *Cow.* 338, *and cases there cited or quoted.*

Moore *v.* Hussy, 98 Hob. (Williams' Ed. and note); Liford's case, 11 Coke 51.
Lymons *v.* Lymons, Hetl. 66.
Brookes Abr., Trespass pl. 35.
Bac. Abr. Trespass G. 2.
1 Woods Conv., 108.
Keil's pleas. 2.
Vin. Abr. Trespass, R. 4, pl. 2, 5.
Case *v.* Degoes, 3 Caines, 261.
Fletcher *v.* McFarlane, 12 Mass., 46.
Emerson *v.* Tompkins, 2 Pick. 491.
Stearns on R. Act, in notes, 419.

Waller's *relation* and *responsibility* to Bigler are well defined in

Robertson v. *Norris*, 5 *Jurist. N. S.*, *Vol.* 5, *Part.* 1, (1859) *p.* 1238.

The case here cited is so similar in principle to the one under consideration, that a syllabus of it, and part of the decision, are here given:

I. T. N. being the printer of a newspaper, became the mortgagee of one half of it in 1840, with power of sale, which he exercised in 1841 selling said half part to his brother, and I. T. N then became *manager* of the paper. In 1848 this half was reassigned to him, and the other half came to him in 1850. In 1857, the original owner of the mortgaged half obtained a decree, that the sale by the mortgagee was invalid. An account was ordered to be taken of all sums received by I. T. N. after 1841, or which, but *for his willful neglect or default, he might have received in respect to the proceeds of the newspaper.*

The language of V. C. Sir J. Stuart is as follows: "It appeared that I. T. N. at best, was

only in possession as a mortgagee. The terms of the decree showed that I. T. N., who was in possession under an invalid contract to buy what was only pledged to him, was only to be treated as a mortgagee in possession. *Now a mortgagee in possession was not merely to account for all he had received, but having taken possession, he was charged with everything that but for his willful neglect and default, he might have received. He was dealt with in a severe way.*"

"And he (Court) had in this case to look at I. T. N. as a man in possession of the property of the paper, from 1841 up to the date of the decree."

"He was improperly acting as proprietor, and in so doing was a trespaser and a wrong doer. That, however, was independent of his character as mortgagee."

And I. T. N. was held to the severe rule of accounting on a cash basis, when he dealt on a credit basis, *i. e.* the most severe responsibility.

Compare the above with the abstract elements of Waller's case.

A virtual mortgagee-friend of a mob makes a hostile foreclosure, while the mob excludes the owner; buys an estate worth $150,000 for $17,000; assumes the *role* of owner of the property, settles for $150 with rioters, who had committed great waste, and are able and willing to pay the full damage; he, besides exercising for four years all the acts of ownership possible to the real owner, even to selling the property, denies his responsibility for damage, and claims the right to re-deliver the premises to the ousted

mortgagor, and to recover the purchase money, on the bond and trust deed already paid by foreclosure. Now is such an one less culpable than I. T. N. *supra?*

Since the liability of termors and disseisors were governed by the same rule, cases of *lessees* as well as those of *trespassers* and *disseisors* may be cited to show what that rule is.

As to Lessees.

"It is common learning," saith Heath, *J.*, in the English Common Pleas, "that every lessee of land * * * is liable in an action of waste to his lessor for all waste done on the land in the lease, *by whomsoever it may be commited.*"

Attersall v. *Stevens*, 1 *Taunt*, 182, 198.
White v. *Wagner*, 4 *H. & J.* (*Md.*), 373.

The reason of this liability is well expressed in the lessee case,

White v. *Wagner supra*, as follows:

"This cause was considered with great learning and research, both *arguendo* and by the Court, which consisted of *Buchanon*, *Earle*, *Johnson* and *Martin;* and *Johnson*, who gave the opinion, says: "It is not novel in the law to make persons, morally innocent, responsible for the acts of those over whom they had no control. In various instances, where the property of the owner is placed in the care of another, such person is liable to the owner for its loss or for injuries done to it, which the possessor could not restrain. The common carrier,

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the Sheriff, and others, are responsible for losses which they could not prevent. As the property of the landlord is placed in the tenant's possession, who has the legal power to prevent all waste from being done to it, and to recover for it when committed, as in most cases it would be impossible for the landlord to ascertain in time, or come at the wrong doer, it appears to have been the policy of the law to cast the liability on the part of the tenant for all waste committed on the property, except when caused by the act of God, or the King's enemies."

Can this mortgagee "trespasser and wrong-doer," with his *bad faith* and *bad acts*, be better off than an *honest* lessee under the same circumstances?

White v. *Wagner* is a strong case against an innocent tenant, who, in theory of law, is *presumed* to be able to prevent waste or obtain satisfaction therefor.

This principle applies much stronger to Waller than to Wagner, or I. T. N. even.

---

1. Another injury done to Bigler was this: Waller (through forms of law) assumed the *role* of owner, and induced the C. S. A. authorities to recognize him as Bigler's agent, and then *fraudulently sacrificed a valuable claim which might have been realized for Bigler.*

The evidence is as follows:

Knapp swears:

91 274 Q. After this fire, did you (Knapp) ever see the plaintiff (Waller) at any place when a conversation ensued with reference to the burning of this mill?

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A. I saw him afterwards at Richmond.

Q. About what time?

A. I think it was the fall of 1862.

Q. What did he say on the subject of the mill?

A. He spoke of the burning of the mill.

Q. What did he say about it?

A. He asked me my opinion of the value of the mill and wharf.

Q. Did he say anything about getting pay for the mill?

A. He said he was making an attempt to get his pay for the burning of the mill from the Confederate Government.

Q. That was the reason he wanted you to value it?

A. Yes; that was the reason.

Waller himself testifies as follows:

"Morris (C. S. A.) said it (the estate) did not belong to me (Waller); I told him *I knew it, it belonged to Bigler*, and I intended to account to Bigler at the expiration of the war. * * * * What shall I allow (for the waste said Morris)? Well, said I, *it is not much.*" ($151.81!!! was allowed). 132 342 131 339

Waller *assumed* the *role of protector* when the wasters were *able* and *willing* to pay *adequate damages*, and admits that he accepted merely nominal compensation for $32,000 waste to the realty, and even greater waste to the personalty.

Waller must respond for the loss occasioned by his *unjust stewardship.*

He is held to the severest rule, as in *Robertson* v. *Norris, supra.*

Waller is not excused because this was *rebel waste.*

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If it is claimed that the rebels were "public enemies," and so an exception to this liability, then it may be said that an alien enemy cannot excuse himself by pleading the act of his own government, because it would be taking advantage of his own wrong.

Tantony v. *Hubbard*, 3 *Bos. & Pull.*, 302.

Exposito v. *Bowden*, 4 *E. & B.*, 978.

"But they were not public enemies."

Vide Justice Chase (*Raleigh, N. C.*) *decision, Shortridge & Co.* v. *Macon.*

The Coin element of this decision should be eliminated from the case, if the Court comes to that.

Last Case. 11 *Wallace Rep.*

The ratio of the value of Confederate money to gold, October, 1863, was not 13 to 1.

95 280 The evidence shows that in the spring of 1862 gold was ten or fifteen per cent. above C. S. A. money.

The damage to Bigler for Waller's breach of this contract to release $3,000, should be allowed in gold, if the coin element is to remain, otherwise, in currency.

The evidence proves that soon after the sale, May 10,
112 308 1863, Bigler laid out a "village" on the estate, and contracted with Johnson, Sterling and Jones, together "with
113 310 half-a-dozen others," to sell to each of them a "village lot" of three or four acres, "for $300 per acre," each lot to be released from Wallace's mortgage lien.

126 332 Waller refused to release, and Bigler lost the sales of
127 333 said lots thereby. These damages are specific and al-
127 334 lowable, being the difference between the then *possible*
127 335 price of $300 per acre and the *actual* price afterwards obtained per acre. This Waller *does not deny*, and I

apprehend that there can be no question concerning the amount of the damages suffered on account of the loss of said sales, there being no discrepancy in the testimony concerning this matter. And the Court will not fail to observe that, in proving the plaintiff's claim, we have carefully avoided putting in evidence what might be considered in the nature of *speculative* or *constructive* damages.

Waller does not deny his refusal to release the "village lots" to "Sterling, Johnson and Jones," at the *request* of Bigler, nor attempt to lessen the *amount* of the land, which he puts at "ten, fifteen or twenty acres," or the *price* it would have brought to Bigler *per acre*, but claims that such release would have injured the estate, *i. e.*, impaired the security for his debt to the amount of $5,000. Now, it may be very well said, that if the release of these lots would injure the estate $5,000 it would benefit Bigler to the same amount, and this sum might properly measure the damages incurred by the plaintiff by the loss of those sales, instead of the $3,000 found by the U. S. Commissioner.

The only defense offered by Waller to this claim for damages was a "second contract" which Waller swore was made the 22d day of June, 1853, and which he avers was a substitute for the first; and he further testifies that he had the means of fixing its date precisely. This second contract is a myth.

If plaintiff is compelled to retake the estate, he should have releases from Waller's heirs.

It was the decision of Judge Underwood, that Waller re-convey the premises to Bigler (to nullify Waller's title under the Saunder's trust).

His Honor, the Chief Justice, excepted from reversal, so much of Judge Underwood's decision as was in conformity with his own findings.

Such a re-conveyance by Waller to Bigler is not only in harmony with the Chief Justice's decision, but was absolutely required by it; for if Bigler pays up the bond, he is entitled to have a clean record from Waller.

Only Waller's heirs at law can make this reconveyance, and they were not made parties at the time the administrator was let in to defend.

If the Court sustain the first point in my brief, these heirs are not wanted here; if not, they must be present to release to Bigler.

Bigler asks judgment against William G. Waller, as Administrator of William Waller, for $3,000.00, with interest thereon from the 1st May, 1851, at *six per centum per annum*, and for $1,165.41⅔, with interest thereon, at *six per centum per annum* from April 2d, 1862. That Bigler's bond be delivered up to be cancelled, and for his costs.

E. L. FANCHER,
J. K. HAYWARD,

Of Counsel for Plaintiff, Appellant.

In the Supreme Court of the U. S.

DECEMBER TERM, 1871.

No. 151.

JAMES BIGLER, *appellant*, *against* WILLIAM G. WALLER *administrator of* WILLIAM WALLER, *deceased, and another appellee.*	Appeal from decree of Circuit Court of United States for the District of Virginia.

CONWAY ROBINSON,
Counsel for Appellee.

H. Polkinhorn & Co, prs., D st., near 7th, Washington.

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DECEMBER TERM, 1871.

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JAMES BIGLER, *appellant*,
against
WILLIAM G. WALLER *administrator of* WILLIAM WALLER, *deceased, and another appellee.*

Appeal from decree of Circuit Court of United States for the District of Virginia.

ABSTRACT OF THE CASE.

The decree appealed from is for part of the purchase money of a tract of land in the county of York, in the State of Virginia, known as Ripon Hall, containing about 2,400 acres, sold for $30,000 by the decedent Waller of Williamsburg, in Virginia, to the appellant Bigler, of Newburgh, in New York. (p. 6.)

There is a memorandum on p. 6 of the agreement as first made on the 21st of April, 1853. While that agreement was executory, it was modified* and in modifying it, the subjoined clause† was substituted by another or dispensed with. For the tract which Bigler swears (p. 152) "was very cheap at the price" he "bought it" and would have brought $40,000," he thinks, "easily," he paid $5,000 and executed the 10th of May, 1853, a bond for $25,000,

* The modification is mentioned by Waller pp. 125, 126, 133, 134, 138, 139, 169. And there is on p. 136 a waiver of notice of demand for the original of the second contract referred to by him, so as to permit his verbal statement to stand as evidence so far as the notice to produce the original is concerned.

† "It is also agreed that the said Waller will allow said Bigler to sell such portion of the land as he may see fit from time to time, the said Bigler paying over to the said Waller such proceeds of the sales as will afford *ample security for the liquidation of the residue of the debt due for the purchase of said estate from the said Waller.*"

with interest, (p. 80 and p. 178) which recognizes the first contract only in respect to the periods of time specified therein for payment.* Thereupon Waller conveyed the land to Bigler (p. 6,) and Bigler and wife made a deed of trust (the 22d of June, 1853†) conveying the land to Robert Saunders in trust, to secure payment at those periods‡ (pp. 7, 8.)

In part of what was so stipulated to be paid, there was up to and including the 10th of May, 1860, paid the sum of $12,000 with interest, "so that on the 10th day of May, A. D., 1861, there was due and unpaid on account of said principal debt the sum of $13,000 and interest thereon for the period of one year." (pp. 12, 81, 124.)

* "This paper witnesseth that I James Bigler, of the State of New York, a resident of Newburgh in that State, am indebted to William Waller in the sum of twenty-five thousand dollars, which I promise to pay within ten years after this date, and at the periods of time specified in a contract drawn up and signed by myself, through my agent, F. W. Hammond, and by William Waller in his own behalf: and I further promise and bind myself and legal representatives to pay interest on this debt of twenty-five thousand dollars, at the rate of six per centum per annum, punctually, at the expiration of each year. Witness my hand and seal this tenth day of May, one thousand eight hundred and fifty-three.

J. BIGLER. [SEAL.]

† Bigler brought the trust deed home for his wife to execute it; she not being in Virginia at the time, (p. 111.)

‡In Waller's examination (p. 125) are the following questions and answers:

"How long before the date of that trust deed did you enter into the contract for the purchase with Mr. Bigler? Have you the original contract?

A. No, sir. I have the date of this trust deed, and by referring to that can tell. There was a paper executed in April, 1853. That paper was not the contract which subsequently was agreed upon to exist between Mr. Bigler and myself.

Q. There was a contract first, and then that was modified?

A. Yes sir.

Q. Where is that modified contract?

A. It is in the trust deed, sir, date ——

(Q. It is embodied there?)

A. Dated 22d June 1853—two months after and more, April 3, 1853, and June 22, 1853.

Q. Did it set it out in full in the deed of trust?

A. Not in full, sir, but the modifications—the differences—are set out."

The clauses in the deed of trust as to the sums to be paid and the times of paying the same are as follows:

"To wit: $2,000 (or more, at the option of the purchaser,) at the expiration of two years from the 10th of May, 1853, and annually thereafter $1,000 (or more, at the option of the purchaser,) until the whole $25,000 shall be paid, it being, however, distinctly understood that the

In so simple a transaction the obligee might, according to the common law, have recovered judgment in an action on the bond, in a very short time. But under the code of procedure of New York an action brought there in November, 1865, was a tedious proceeding.* Saunders, the trustee, by Waller's direction, having advertised the land (pp. 22, 23) to be sold under the deed of trust, Bigler, on the 16th of June, 1866, filed in the Circuit Court of the United States for the district of Virginia the bill (pp. 1 to 5) on which was awarded an injunction as prayed for, and to which answers were filed by Waller (pp. 17 to 20) and by Saunders, (pp. 20 to 22;) and on the 15th of May, 1867, that court made a decree for an account (p. 24) under which proceedings were had.† Depositions

whole of the said amount of $25,000 is to be paid within or at the expiration of ten years from the 10th of May, 1853, so, that whatsoever sum shall remain unpaid on the 10th of May, 1863, shall then be due and payable to the said Waller by the said Bigler. It is understood further, that the interest, at the rate of 6 per centum per annum, which may be due at the end of any and every year on the whole principal amount then due shall be paid at the end of such year, and that otherwise such a defalcation shall be considered to have been made by the said Bigler as shall authorize the said Waller to require the said Saunders to execute this trust according to law." Then follows the covenant of warranty. After which is this clause: "It is further understood that a failure on the part of said Bigler to pay the sum of $2,000 at the least, with interest, upon the remainder as well as upon the $2,000, on the 10th day of May, 1855, or a like failure to pay at least $1,000 annually thereafter, with interest as aforesaid, shall be considered a defalcation on the part of the said Bigler, at any one of the periods referred to, as shall a failure to pay the amount remaining due on the 10th day of May, 1863, with interest; and that any such defalcation occurring at any one of the periods mentioned shall be sufficient to authorize the said Waller to require the said Saunders to execute this trust according to law." (p. 8.)

* In an action, there, on the bond to recover the $13,000 and interest from the 10th of May, 1860, Waller, in November, 1865, filed his complaint, (pp. 12, 57 and 80,) Bigler, in January, 1866, filed his answer, (pp. 13 to 16, 58 to 61, and 81 to 85,) and Waller, in March, 1866, filed his replication. (pp. 10, 11, 62, 63, and 85 to 87.)

† Meanwhile, under the code of procedure of New York, the action there was, by an order of the court, made the 4th of February, 1867, referred to Luther R. Marsh, Esq., as sole referee, (p. 87,) and sundry witnesses were there examined, (pp. 41 to 53, and 87 to 170.) The referee's report is pp. 171 to 174; Waller's exceptions thereto are pp. 174 to 176; the first judgment, thereon, is pp. 176, 177; and notice of the appeal, therefrom, p. 177, of which appeal, under the agreement, (p. 25,) evidence was filed in the suit in Virginia, (pp. 39, 40, 69, 70, 71.) The appeal was heard on the 16th of December, 1868, at a general term of the Supreme Court, held at the City Hall, in the city and county of New York, and it was then ordered and adjudged that said judgment be reversed, that a new trial be had, and that the order of reference be vacated. (pp. 71, 72.)

were taken, pp. 28 to 36, exhibits were filed, pp. 37 to 39, and the so-called commissioner—perhaps more notorious now than he was then—made the remarkable report, pp. 26, 27, to which Waller's exceptions are, p. 27. A decree made thereupon (p. 54) in the absence of Waller's counsel was soon set aside, (p. 55.) At a succeeding term the suit being continued to await the decision of the cause pending in New York, (p. 56) and it being desired to get rid of that impediment so that the Circuit Court of the United States in Virginia might decree on the merits, the parties on the 25th of November, 1869, consented that the action in New York might be discontinued without costs to either party, and that an order to that effect should be entered, and the same was entered accordingly. (p. 74.)

The suit in Virginia having been revived in the name of Moses R. Harrell, committee and administrator of Robert Saunders, deceased, and in the name of William G. Waller, administrator of William Waller, deceased, (pp. 55, 56, 73, 75,) came on to be heard, there being in the cause as it stood at the hearing the following

EVIDENCE.

As to the allegation first made in the bill, p. 3, and denied in the answer, p. 18, the statements in the deposition of Bigler, pp. 111, *et seq.*, are met by those in the deposition of Waller, pp. 124, *et seq*, and nothing that gives support to the allegation is stated by Knapp, (p. 91.) It is very clear that no breach of the agreement in the clause relied on is shown by what is said as to Mat. Waller, cousin of William Waller, (pp. 30, 113, 114, 146, 168, 170.) No other persons are named by Bigler, (p. 113,) or O. M. Smith, (pp. 145, 146,) except Captain Sterling and Captain Johnson, with whom Bigler was negotiating (pp. 113, 114.) He says, "three or four acres would cover what they wanted," (p. 116.) The specific offer made by him and declined by Waller was $50 an acre for a release of 20 acres (p. 136,) and he was not prohibited from selling any of the property except in that particular way (p. 135,) of a few acres at the water front, (p. 120.) Waller thinking that it would be objectionable to have such small places taken off there, exercised his judgment as to the sufficiency of the security, and exercised it prop-

erly.* Yet, although Waller declined releasing a very small part embracing not more than 20 acres on the water front, which at the rate offered by Bigler to him—$50 an acre, (p. 169)—would have produced to him but a small sum, he did, nevertheless, release a much larger parcel. Pursuing his own opinion and that of others, he would not release by themselves those small lots in the center of the estate, which would have greatly injured the farm, (pp. 126, 127, 128, 134, 153.) But he offered to release, and did release 150 acres for which Bigler paid him $50 per acre, (pp. 134,) and those 150 acres included the very lots which Bigler had applied to Waller to release† (pp. 128, 143, 144.) And so far from instituting proceedings to obtain any other release than that which Waller was willing to make and did make; and so far from any claim for damages against Waller, Bigler fully acquiesced in Waller's course. Not only did their relations continue friendly (p. 143) during the period which elapsed between the Spring of 1854, the time of the alleged refusal to release and the Spring of 1861, when the war began,‡ (p. 127.) But during the whole of this long period, as principal and interest became payable, Bigler went on from time to time to pay the same§ (p. 124) without alleging any

* In the examination of Robert Douthat, (p. 34,) is this question as to his own estate on James river. "What do you consider the sale of 20 (misprinted 28) acres of that land immediately in the center of your estate and fronting the river, with a right of way through the entire estate, if sold, would have on the residue of the land; in other words, what would you sell it for?" and he answers thus: "I would not sell 20 acres in the center of my estate for less than a third of the half the value of my whole estate, for the reason that the sale of a lot in the center of my estate would materially injure the said estate."

† Bigler sold other lands, about 64 acres to Knapp and 120 acres to Darral and Farris (p. 144) without paying Waller one cent of the proceeds of such sales.

‡ See Bigler's letter of May 12, 1860, (p. 39.) Waller was invited to Bigler's house on the Hudson, and Bigler to Waller's house in Williamsburg, (p. 127.)

§ In Bigler's examination (p. 116) are the following questions and answers

Q. What is the entire amount of money on account of that purchase that you have paid to Mr. Waller?

A. Seventeen thousand dollars and interest.

Q. Interest on the $17,000; the interest on the whole debt?

A. From time to time as the payments arrived.

Q. Up to what time do you claim that you paid all that was due on the contract?

A. The 10th day of May, 1861; all before that.

Q. You claim to have fully discharged?

A. All before that I have his receipts for. There was no payment past due that was not paid when the war broke out.

damage (p. 135) or making any claim to deduction on account of this matter now pretended to be a set off. And the year before the war began, there seems to have been a negotiation for paying off the residue upon a discount of 6 per cent. (p. 168 and p. 37.) All which shows that this pretended set off is an after-thought—a thing which has been thought of only since the war, and which, in truth and in fact, has no foundation to rest upon.

With the exception of a matter of $2,000 in Confederate notes, as to which credit is given Bigler by the decree p. 75, the other allegations p. 3, are not proved in any material respect, but in every material respect are disproved. See, especially depos. of Custis, pp. 29, 30, 32, 33, in connection with Knapp's statement, pp. 90, 110, and Bigler's, p. 112. In April, 1861 Waller was not within 200 miles of the place, (p. 128.)* It was left by Bigler in charge of Evans and Southwell. (See Knapp, p. 102; Bigler, p. 117,) and notwithstanding what Bigler elsewhere says he admits (p. 117) that when those agents of his left the place in April, 1861, they left it in charge of Knapp. And consistently with what Bigler there says, Knapp himself states that he was in possession of the place under Bigler's agent, and afterwards under Bigler's own authority, from April, 1861, until June, 1861, when possession was taken by Gen. Magruder, (p. 88.) What occurred is stated by him with more precision on subsequent pages† and his statements are supported by Wilkinson Deane‡ (pp. 94, 97,) who had also been in Bigler's employment. The evidence shows that some of the men who had worked on the place for

* Waller was "not at all on the farm for one moment during the year 1861." (p. 129.)

†He states (pp. 90, 91) that some of Bigler's employees stayed through the whole year, and others till after Gen. McClellan's retreat before Richmond. He states (pp. 102, 103, 104) that when Evans and Southwell left the place in April, 1861, he took charge of it; that he transacted business for Bigler until the Confederate authorities took possession of the place, and afterwards for them; Gen Magruder being in possession of the entire district. (p. 128.)

‡ He states that the Confederate forces being in possession of the district around Yorktown and Bigler's mill, he took charge of the mill for the Confederate government, and was there four months under the Confederate authorities. Under Gen. Magruder's orders he stayed there until the evacuation of the peninsula by Gen. Johnston's army, about, May, 1862. (pp. 94, 95, 97, 98.)

Bigler remained on it during the whole war and cultivated a portion of the farm, (pp. 101, 102,) and further shows that so far as Bigler was deprived of possession of the premises or unable to get thereto, such deprivation and inability were not caused by Waller, but resulted from the state of war existing at the time.*

After word received from Williamsburg, and a personal interview with Knapp, one of Bigler's friends, Waller, who had been a lieutenant of cavalry in the army of the Potomac, and had, in bad health, resigned that position, went down to Williamsburgh in March, 1862, having previously written to Saunders, the trustee, about the farm, (p. 140.) In respect to the sale spoken of by Knapp, (pp. 88, 107, 108,) he, Waller, states (pp. 130, 131) what he caused to be done and his object.† That was to protect the property and save it so far as could be done from destruction. It being Waller's only security for the payment of his debt, he desired not the destruction

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*In Bigler's examination, p. 117, are the following questions and answers:

Q. From that date, that is the date of the letter to Mr. Knapp, until the date of yours referred to, as occurring in 1865, did you go to the farm; did you send any one there to look after it for you, or did you write to any one else to look after your property?

A. I did not go there; I started to go but could not get beyond Fortress Monroe. I didn't send any one, nor did I write any one to ask him to take charge.

Q. During that period did you communicate with anybody from the farm to learn what its condition was?

A. I frequently heard from there, from soldiers and others.

Q. What was the date of your visit as far as Fortress Monroe?

A. I think it was in 1862.

Q. At that time in whose governmental military occupation was the district in which the farm is situated?

A. I understood at the time it was in the rebel lines. I have no personal knowledge. I don't know who was in charge.

Q. You mean their military lines?

A. Yes, sir; I learnt at Fortress Monroe that it would not be safe for me to go there, and so I did not go.

Q. And the reason why it would not be safe was because it was within the rebel military lines, was it not?

A. Yes, sir."

†My object in buying the farm, was if Gen. Johnston had remained in the peninsula, I should have gone to Gen. Magruder and asked him not allow the farm to be so entirely ruined as it was then; for I had this interest in it, and I believe Gen. Magruder would have done anything he could have done, inasmuch as he was an intimate friend of Mr. Saunders." (p. 131.)

but the preservation of the property. Therefore, while Gen. Magruder was holding it as abandoned property, Waller, by letter, (p. 140,) directed Saunders, the trustee, to sell it under the deed of trust. The law officer of the Confederate States injoined the sale, but the injunction was dissolved on the ground of the superior lien under the deed of trust (pp. 130, 140, 141.) War interrupting communication between Virginia and New York, (pp. 115, 136) the trustee sold without notice in a New York paper, (p. 21.) The sale was in April, 1861, of the whole tract, except so much as had been released by Waller, (being 150 acres) and except the two parcels of about 64 acres and 120 acres mentioned *ante* (p. 5,) in note. The property thus sold was purchased by Waller for $17,000 Confederate money (p. 140,) and conveyed by Saunders to Waller* (p. 178) but no act of Waller prevented or was calculated to prevent Bigler from coming on the farm. On the contrary, Waller declared repeatedly that he had purchased the farm to protect it against the Confederate government and squatters generally, and that he would surrender it to Bigler at the termination of the war on his paying the residue of the purchase money,† (pp. 130, 133, 136, 137, 145.) Waller, though on the place on the day of sale and the next day after, then left, (p. 140) and did not see it any more till 1865, after the close of the war. (p. 130.) During the war there was no time at which he was in possession of the place or had any agents there, (pp. 101, 136.) He may have desired Kellam, a farmer, who lived on an adjoining farm, (pp. 110, 89,) to do what he could to protect and preserve the property, but *Knapp* continued in possession—not under Waller but under the military authorities of the Confederacy during the short time that elapsed before the evacuation of the peninsula by Gen. Johnston, in May, 1862,‡ (pp. 88, 104.) *Dean*

*Waller thinks though Saunders made a deed to him it was never recorded. (pp. 135, 136.)

† Page 140 he says: "Immediately after the estate was purchased by me, a friend of mine remarked: 'I congratulate you; I think you have made money.' I replied, 'No, sir, when this war closes, no matter what the result may be, I shall give this estate to Mr. Bigler on the payment of the debt due me.'"

‡ "The sale took place on the 1st of April, (p. 178) and the battle of Williamsburg was fought on the 4th of May," (p. 143.)

being asked, "what was the date at which the occupation of the farm and that district by the Confederate army ceased," answered, "at the battle of Williamsburg the Confederate authority ceased there; it did until McClellan's retreat; it was not under any particular authority after that—the picket lines on one side of one army and the picket lines on the other side of the other army," (p. 102.) Custiss says this estate "was not occupied by either army after May, 1862, being near the lines held by the Federal army," (p. 31.*)

Bigler has said a great deal about his improvements on the place after he took possession of it in 1853 (pp. 112, 114, 115,) and about the injury thereto during the war (p. 115,) especially from burning and destroying in May, 1862. And in reference to this matter he has examined *Wilkinson Dean*, who went in December, 1853, to work on Bigler's mill, (pp. 92, 93, 96, 100, 101,) and also examined his, Bigler's partner, O. M. Smith. (p. 147, *et seq.*) The value of the improvements and the loss from such burning and destroying seem to be greatly exaggerated † (pp. 89, 95.) But whether exaggerated or not, there is no ground for charging Waller in respect thereto. (pp. 89, 108, 109, 136.) He lived not in that section of the country but in Lynchburg (pp. 124, 126,) 200 miles off, and was never in any military service in the lower part of Virginia. At the time of such burning and destroying, Waller was not in the peninsula, and not in the army of the peninsula, but in a locality quite distant from the peninsula and consequently quite distant from such burning and destroying. (pp. 34, 36.) His interest in

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* He says: (p. 33.) "The federal lines was a creek, separating Bigler's farm from the federal army. The distance from that creek to Bigler's lands was not more than a half mile; to the village the creek was less than a mile and a half. The Confederate army was not near Bigler's after the evacuation."

† They had all been put on the farm before the time (1856) at which the estate was set up at auction by Bigler and bought in at $25,000. (p. 127.) It was then offered at that sum. (p. 170.)

the property utterly repels the idea that he would be instrumental in injuring it. *

From the time of the Confederate army withdrawing from that neighborhood, Waller was never down there, (p. 110.) The farm had no managers or superintendents that Knapp was aware of during the time the peninsula was under the control of Gen. McClellan's army; Knapp remaining at his home, a mile from the mills, until after that general's retreat down the peninsula, † (p. 104.)

Notwithstanding that retreat of Gen. McClellan, it appears that the Confederate armies did not again have control over that district. ‡ Indeed during the three

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*In Waller's examination, (p. 129) after his statement that he was only on the estate once during the war, which was when the sale occurred in April, 1862, (the 1st of that month, p. 178,) there are the following questions and answers:

Q. Had you any personal knowledge of, or connection with, any of the destruction of the property on the farm which is referred to in the testimony in this case, the burning of the saw mill and boarding house, or injury done?

A. Nothing on earth: and in that connection, I say, is it not strange that I should be accused of burning property which is my security for the payment of the debt?

Q. Your answer is that you had no cognizance of it at all or connection with it.

A. Nothing upon earth.

Q. Were you, at that time in the army of the peninsula, some portion of which is alleged to have done this destruction?

A. I never was attached to the army of the peninsula for any moment."

†In the examination of Knapp are the following questions and answers (p. 105.) as to the Bigler farm and property:

Q. Did Gen. McClellan's forces occupy it?

A. There were a few men occupied it; they landed provisions there, and a few men occupied it to receive those provisions; it was not strictly in the possession of the Union army.

Q. Did they not take possession of the dock and other property for the military purposes of the army?

A. Yes; they would use a portion of it—they took military possession of whatever was necessary.

Q. Did they remain in military possession of that as long as army purposes required it—as long as the army stayed in that district?

A. Yes, sir; or rather until after McClellan's retreat through Williamsburg.

‡In Knapp's examination (p. 105,) are the following questions and answers:

Q. After Gen. McClellan's retreat and the abandonment of his military possession of a portion of this Bigler property, as you have stated, did the military commandant of the Confederate forces again take possession?

years next after the battle of Williamsburg, it was much more in the power of Bigler than of Waller to get to the farm, * (p. 141.) Bigler, himself, states, *that if he could have got to the mill he could have made it doubly valuable, furnishing his own government, and he attempted to get there in* 1863, *and could not get there* † (p. 153.) Meanwhile the tenants of Bigler still continued to occupy portions of his property. ‡ Dean deposes (p. 101,) that when Bigler was absent from the farm, he does not know of any one being on it as agent or employee of Waller; but he does know that some of the men who were in Bigler's employ at the commencement and worked on it for him, remained on it during the whole war, (pp. 101, 102.) He

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A. No, sir.

Q. Did the Confederate armies again have control over that portion of the district?

A. No, sir; there were frequent raids and scouting parties down there, but they never held possession of that portion of it during the whole war, with the exception of Wise's raid.

* In the examination of Waller, (p. 134,) are these questions and answers:

Q. After the commencement of the war, from what date was this farm within the federal lines?

A. From the battle of Williamsburg, which occurred on either the 3d or 4th of May, I do not remember which.

Q. What year?

A. 1862; one month after the sale. From that time till 1865 Williamsburg was in possession of the federal army and Port Magruder, not more than half a mile from Williamsburg.

Q. From the location of this farm?

A. That was four miles from Williamsburg—just close to Williamsburg.

Q. Was that farm within the federal lines so that Mr. Bigler could get to it?

A. I thought so certainly.

† If in 1863 he was prevented from going there by a military officer, it must have been an officer of his own government.

‡ In Knapp's examination (p. 106,) are the following questions and answers:

Q. During all that time did you have to give any supervision to or attendance to any matters about Mr. Bigler's farm or property?

A. No, sir.

Q. Did anybody?

A. No, sir.

Q. Was it left alone and abandoned by everybody and to anybody, or were there tenants on it who occupied it?

A. There were tenants on it who occupied portions of it.

Q. Did the occupation include the buildings on the greater portion of it?

A. No, sir; but on a considerable part of it.

states that a portion of the farm was until the war closed cultivated by those who stayed; and that Mr. Henley, (Bigler's) agent and neighbor, moved on it and stayed, (p. 102.) All the circumstances show that no weight should be attached to statements as to possession by Waller, or tenants under him, whether made by Bigler or his partner, Southard. Indeed the latter has, on cross-examination, said enough to prevent erroneous inferences from what he has said on his direct examination, (pp. 118, 119, 151;) the so-called tenants of Waller appearing to be the same persons that Bigler, before the war began, left on the place,* (pp. 165, 167.)

Knapp, previous agent of Bigler, having been in possession under the Confederate authorities for about a year, Waller, with the desire of promoting Bigler's interest, received in the Fall of 1863, on account of that possession, $2,000 in Confederate money, (then at a discount of thirteen for one,) with the intention of accounting therefor to Bigler at the end of the war, (pp. 130, 131, 141.) †

The mill having been burnt, Waller seems, in a conversation on a street in Richmond, mentioned by Knapp, (p. 109,) to have given permission to Knapp, who, (previously to that possession under the Confederate authorities,) had been Bigler's agent, to remove some old iron, (p. 89,) but the removal was never made, and the conversation there is all that Knapp heard Waller say as to his owning or claiming the right to move anything off the farm, (pp. 109, 110.)

In fact nothing on the premises was removed by Waller or under his authority, (p. 130,) and what he said and contemplated about the iron is clearly explained by him, p. 131. The alleged acts of ownership over the premises are reduced to this: That in the latter part of 1863 Waller offered for sale his claim on the estate, with special warranty; stating that he would convey no other title to that estate than the trustee Saunders gave to him. But

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* Custiss is "satisfied that all the tenants of Bigler's remaining after the others left continued in possession of the quarters during the whole war," (p. 33.)

†Waller never, during Bigler's absence from Virginia, received anything on account of the farm except this sum which was allowed by the Confederate authorities for its occupation, and the obtaining which he supposed would be for Bigler's interest, (pp. 130, 131, 132.)

the offer so to sell proved fruitless, (p. 35;) Waller not being willing to guarantee against Bigler's claim, as he recognized him as the owner of the estate, (pp. 141, 142.)

Bigler has taken some testimony as to rents, (pp. 147, 149, 150, 152, 153, 154, 155,) which seems very immaterial, (pp. 169, 170.) Custiss being asked "what would you suppose an estate, situated as this estate was from 1861 to 1865, was worth for rent *per annum* for any purpose?" answers, "I should not suppose it was worth anything, it being right on the lines, where it was raided on by both armies," (p. 31.) Other witnesses concur.*

In the examination of *Custiss* (p. 31) there is this question: "Knowing, as you do, all the facts and circumstances relative to the abandonment of this estate by Bigler's tenants, do you or not believe that said Waller did, by his course, injure Mr. Bigler one cent by purchasing the estate?" and this answer: "I cannot see how it could injure him. The majority of Bigler's tenants remained all the time during the war on the place, and there were other tenants, in houses purchased of Bigler by parties who bought of him, remaining with the tenants alluded to. Other parties nearer the lines than those houses vacated their own houses and filled up the empty houses on Bigler's place, thereby taking care of the houses. The lands could not be cultivated, because the crops could not be protected."

One of the old tenants living on the place was Mr. Henley, (p. 16.) With him Waller left a letter for Bigler, (p. 112,) which if not read by Bigler (p. 120) was, at his request, read by Henley to him in May, 1865, (pp. 161, 162,)—a letter which Bigler might have produced and has

*See *Wellington Goddin, p.* 35; *Thomas R. Bowden, p.* 36; *R McJones, p.* 36. In the examination of *Robert Douthat* are these questions and answers:

"Q. Please state, knowing as you do the condition of the country in James City, Charles City, and York, the rental value of real estate in those counties during the war?

"A. I consider the rental value of land there, at that time, as nothing. I let a man have my estate for that time for simply trying to take care of it for me. I got nothing from him.

"Q. What was the average of the income from your estate previous to the war?

"A. From $7,000 to $13,000 gross revenue. I never made less than $7,000, and have sold $13,000.

"Q. What was the rental value of your estate during the war?

"A. Nothing, sir."

not produced, and which, according to Waller, (pp. 132, 133,) stated that he had bought the farm and intended to surrender it whenever Bigler paid for it; or as it is expressed in another place (p. 137,) that he was then prepared to give him a full unqualified right to the property if he would pay up the money.

Bigler states that about the middle of May, 1865, he obtained through Gen. Ludlow possession of the place, that general's order referring to it as abandoned property. (pp. 112, 119.) What was then said to and by that general is deposed to by Geo. H. Southard. (p. 157.) As to the conversations between Bigler and Waller when the former was going to Gen. Ludlow's and after he returned, there is some difference between the statements of Bigler (pp. 112, 118,) and those of Waller, (pp. 124, 125, 132, 137, 138,) but the true state of facts so far as material is sufficiently manifest. * Bigler, to prove his own accuracy, calls himself again (p. 151,) and calls his partner, George H. Southard. (p. 154,) who went to Virginia with him, (p. 157,) and before meeting Waller was asked to "remember what he said, as there might be occasion to use it afterwards," (p. 157.) When asked 'if there was no admission that the debt was due,' he answers, 'no, sir. Mr. Bigler was very evasive in his remarks about it,' (p. 155.) On cress-examination being asked if Waller said 'Mr. Bigler can you now settle for the farm.' or something like that? he answers 'can we settle up our matters,' as near as I remember, (p. 156,) and he 'understood that Mr. Waller referred to some balance that was due on the farm,' (p. 158.) Then there are the following questions and answers, (p. 158.)

"Q. Before you met Mr. Waller did not Mr. Bigler say something about that he owed this money to Mr. Waller, but that he meant to make some offsets against it?

A. Yes sir, I think.—

Q. (Interrupting.) He told you that?

A. Yes, he said something to that effect, I don't remember exactly.

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* Bigler admits, (p. 121, 123,) that in the conversation in Williamsburg he claimed, that notwithstanding the sale by Saunders under the deed of trust, he (Bigler.) was still owner of the farm, and that Waller told him he would release his claims on the farm on his paying the balance of the purchase-money with interest, and that he told Waller he would settle with him if he would allow him for damages done to the place; thereby meaning damages done by the Confederate armies to the place.

The witness does not remember that in any of the conversations, Bigler laid any stress upon there having been proceedings to sell the farm under the trust deed, (p. 158.) He represents Bigler as not telling what his exact claims were except that he had offsets for damages done to the place by the Confederate forces and by Waller, (p. 159.) And he represents Waller, as saying, that when he bought the place he had calculated to return it to Mr. Bigler whenever they could make a settlement.

Q. Whenever he paid the balance due?
A. Whenever he paid the balance due he would return the place.
Q. Did Mr. Waller say that plainly, and especially to Mr. Bigler?
A. I think he did.
Q. Did he not go on further, and at some length tell Mr. Bigler how it was that he bought it in and closed up the trust deed; did he not do that particularly and specially?
A. Tell him why he bought it?
Yes, how he came to foreclose it? Did he explain that he did it to save the property from damage and waste?
A. He said the place was all going to rack and ruin, I think, and he had it sold to save it."

When asked whether Bigler did not make some reply to that statement of Waller, he answers, (p. 160) "if he did make a reply it was very evasive; that is he simply said 'well that may be or something to that effect.'"

From all that appears as to Waller's declarations, his letter to Henley and the conversations with Bigler, the conclusion is that Bigler was approached by Waller, not as claiming and insisting he (W.) was owner of the property but as a creditor seeking payment of the balance due from Bigler on his purchase. In fact both parties have treated the sale by Saunders in 1862 as invalid; there being a second attempt by Waller to sell under the deed to Saunders, and in this suit an injunction obtained by Bigler to restrain such sale.

Wilkinson Dean was again in Bigler's employ from the close of the war in the Spring of 1865 until December, 1865, (p. 95, 100, 101.)* On the 4th of that month, Bigler wrote to Waller the letter, p. 179. It may be inferred that letter was received only a few days before Waller's reply of February 12, 1866, wherein Bigler's answer to the complaint in New York is commented on (pp. 37, 180.) On p. 177 is a letter of March 9, 1866,

* Dean then took the farm on shares with Bigler until July 1866, when there seems to have been some contract by Bigler to sell the estate for $30,000, (pp. 118, 123, 151, 152.)

from Bigler to Waller. Subsequent to the filing of Bigler's bill in this suit, Waller wrote to him the letter of January 14, 1867, p. 38 and p. 80.

DECREE OF CIRCUIT COURT, AND APPEAL.

The opinion of the Circuit Court having been pronounced by *Chase*, C. J., as set forth, p. 75 to 78, that court by its decree of the 3d of June, 1870, (p. 75) sustains Waller's exceptions to the report of commissioner Chahoon, except so far as said report is in conformity with the findings of the court hereinafter stated. And the court proceeding to ascertain so far as necessary to the determination of this controversy, the equities of the parties found that upon the contract between Bigler and Waller, made the 2d of April, 1853, there was due from Bigler to Waller on the 10th of May, 1860, on account of purchase money for the tract of land mentioned therein, the sum of $13,000; that Waller is entitled to interest thereon at the rate of six per centum per annum except from the 19th of April, 1861 * to the 26th of May, 1865; † and that Bigler is entitled to a credit of $2,000 in Confederate notes received by Waller in October, 1863, and then worth at the rate of thirteen for one, $153.84 in United States coin, with interest; but that Bigler is not entitled to compensation for damages alleged to have resulted from failure of Waller to make releases of portions of the estate sold by him, nor for other acts or omissions charged in his bill. And thereupon the court decreed that Bigler pay to Waller's administrator the sum

* This was the date of the President's proclamation of blockade of the ports within the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas. The proclamation of the blockade of the ports of Virginia was not until the 27th of April, and in fact there was a continuance of the mails of the United States, and of transportation of passengers by steamboat and railroad between the States north of the Potomac and Virginia until the fourth Thursday of May, 1861—the day on which a poll was opened to take the sense of the qualified votes of the Commonwealth upon the ratification or rejection of the ordinance of secession in Sess. acts of 1861, pp. 3, 4.

† In fact Bigler was in Virginia immediately after the surrender of Gen. Lee's army. According to his own deposition (p. 112) he was at Williamsburg in Virginia, in personal communication with Waller, the middle of May, 1865.

of $17,377.48 in United States coin and to the several defendants their costs. And the court dissolving the injunction which had been granted Bigler, substituted a trustee in the place of Saunders with power, unless the said sum should be paid, to sell so much of the land embraced in the deed of trust from Bigler, as had not been by him sold with Waller's consent.

From this decree the appeal was allowed.

POINTS AND AUTHORITIES.

I. Waller might pursue all his remedies at once. *Burnell* vs. *Martin*, 4 Dougl. 18; *Rees* vs. *Parkinson*, 2 Anstr., 497; Coote on Mortgages book, 5, ch. 4, pp. 497,–8, of 3 Eng., p. 572, of 2 Am., edi.; or might omit or discontinue one remedy and pursue another. In Courts of the United States he is entitled to a remedy in equity according to the principles of equity, as distinguished and defined in that country from which we derive our knowledge of those principles. *Robinson* vs. *Campbell*, 3 Wheat., 222, 223. On those principles Bigler, who has come into a court of Equity asking equity, has no equitable claim to relief against the payment of that part of the principal of the bond (p. 7,) which remains unpaid, *Wollcott* vs. *Sullivan*, 6 Paige, 119; nor against the payment of interest on that part except for such time as he may have been prevented from paying Waller by the war, and the prohibition of intercourse between New York and Virginia. *Ward* vs. *Smith*, 7 Wallace, 452.

II. A claim for unliquidated and uncertain damages on such a ground as is mentioned in the bill, (p. 3,) could not be set off at law in England, 5 Rob. Pract., ch. 87, § 6, p. 964, *et seq*; or Virginia, Id., ch. 89, p. 999, *et seq*; nor even under the code of procedure of New York, Id., ch. 89, § 6, p. 1011. The principles of equity as to such a claim are very clear. In Virginia, in 1803, when an allowance was claimed for injury done by forbidding the sale of an estate, *Lyons*, J., said—"If there had been any ground for the supposed injury, when was it ever heard, that the execution of a contract was to be suspended until an issue relative to a tort could be tried, so that

the damages might be opposed as a discount against the debt?" *Harris* vs. *Magee*, 3 Call., 505. It is a valid objection to the so-called set off, that it is in the nature of redress for a *wrong* or *injury* committed, and not for a *debt* due. *Duncan* vs. *Lyon*, 3 Johns., Ch. R., 357; *Webster* vs. *Coach*, 6 Rand., 519.

The mere existence of cross demands is not sufficient. *Gordon* vs. *Lewis &c.*, 2 Sumner, 634; *Rawson* vs. *Samuel*, 1 Cr. & Phil., 178, 18 Eng., Ch. R.; *Dodd* vs. *Lydall*, 1 Hare., 337, 25 Eng., Ch. R; *Gordon* vs. *Pym*, 3 Hare, 233, 25 Eng., Ch. R.; *Irving &c.* vs. *De Kay and wife*, 10 Paige., 319; *Dade* vs. *Irwin*, 2 How., 383.

III. There is not even a valid cross demand for damages arising from the alleged breach of the preliminary executory agreement cited *ante* p. 1, note. For 1, that preliminary executory agreement could after the execution of the bond, (p. 7,) the deed of bargain and sale, (p. 6,) and the deed of trust, (pp. 7, 8,) only operate so far as, and no farther than, it is recognized in the bond, that is, only as to the periods of time for payment and not as to any other matter. *Howes* vs. *Barker*, 3 Johns., 508; *Houghtaling* vs. *Lewis*, 10 Id., 299; *Critzen* vs. *Russell*, 10 Id., 78; *Wilson* vs. *McNeal*, 10 Watts., 426; *Creigh* vs. *Beelin*, 1 W. & S., 88; *Gregory* vs. *Griffin*, 1 Barr., 211. 2d, Even supposing that after the execution of the bond and deeds, any regard may be had to that clause of the preliminary agreement which is cited *ante*, p. 1, note; yet the agreement therein allowing Bigler to sell is on condition of his paying over to Waller "such proceeds of the sales as will afford *ample security for the liquidation of the residue of the debt* due for the purchase of said estate," and the question whether there would be ample security was not a matter to be determined by Bigler, (pp. 120, 121;) and the course of Waller in this matter as stated *ante*, pp. 4, 5, was not unreasonable and does not give Bigler ground for claim. *Warner* vs. *Gouverneur's exrs.*, 1 Barbour, 40. 3d. No damage was sustained by Bigler from not getting the release of the small lots as first applied for, (pp. 91, 92, 135,) for the one hundred and fifty acres released included the land proposed for those very small lots, (pp. 128, 143, 144.) 4th. The circumstances stated *ante*, (p. 5,) are equivalent to an admission by Bigler, that up

to the period of the war, there had been by Waller no violation of the agreement that would entitle Bigler either to an action or set off. *Jackson* vs. *Allen*, 3 Cow., 230. When a landlord receives a sum as the last quarter's rent, the rent for previous quarters is presumed to have been paid. Co. Lit., 373 a; Gilb. Ev., 157; 1 Esp., N. P., p. 239 of Eng., p. 71 of N. Y. edi., 1811. And where a man goes on from year to year to pay installments of principal and interest as they become due, the presumption is that he had no valid set off which would have entitled him to release from paying any part of that which he did pay. In an action on a bond for money, payable by installments, an obligor who, in an action for some installments, pays money into Court, thereby admits the contract and a right to recover the sum so paid, (1 Greenl. Ev., ch. 4, § 27,) and would not be permitted to prevent recovery of future installments upon the ground that at the time of payment he had a set off. Here Bigler can stand on no better footing.

IV. As to all the other wrongs and injuries complained of on p. 3 they are less connected with the bond and deed of trust, (pp. 7, 8,) than an assault and battery of a tenant by the landlord would be connected with the landlord's claim for rent. *Drake* vs. *Cockroft*, 4 E. D. Smith, 39; *Patterson* vs. *Richards*, 22 Barbour, 145; and *Barhyte* vs. *Hughes*, 33 Id., 1011, cited in 5 Rob. Pract., ch. 89, § 6, p. 1011.)

A valid set off can only arise out of a valid contract, and it would be difficult to maintain that in a state of war, existing on the 1st of April, 1862, there could be made between Bigler and Waller a valid contract on which an action could be sustained. *Griswold* vs. *Waddington*, 16 Johns., 447. But independently of any point of this nature there is not upon the case as shown by the evidence stated and referred to, *ante* p. 6 to p. 15, any valid cross demand as to any matter alleged in the bill, with the single exception of the $2,000 in Confederate money received from the Confederate authorities for a year's possession, as to which sufficient provision is made by the decree.

V. In respect to the sum adjudged and declared to be due

from Bigler to Waller for principal and interest there is no error of which the appellant has any right to complain. Nor has he any just right to complain that the same was decreed to be paid "in United States coin." For as this court said in 1844 "it is the rights of the parties, at the time the decree is rendered, that ought to govern the court in rendering the decree." *Randel* v. *Brown*, 2 How, 423. Now, here the Circuit Court, in rendering the decree of the 3d of June, 1870, was governed by the rights of the parties at that time as they then were under the Constitution of the United States and the decisions thereupon, 5 Rob., Pract., ch. 86 § 2, p. 938 to 941. For, according to the opinion of this Court delivered by *Marshall*, C. J., subsequently to the war of 1812–'15, to wit: in 1819 "nothing but gold and silver coin can be made a tender in payment of debts." *Sturges* v. *Crowinshield*, 4 Wheat 204, 205. And again in the same year, and in the same term, with *Randel* v. *Brown*, this Court said that "by the Constitution of the United States (section 10) gold or silver coin made current by law can only be tendered in payment of debts." *Gwin* v. *Breedlove*, 2 How. 38. And the decree of the Circuit Court is in accordance not only with these authorities but also with other authoritative decisions of this Court which had been made since the war of 1861–'65, and were in full force and unreversed when the Circuit Court, on the 3d of June, 1870, made its decree. *Bronson* v. *Rodes*, 7 *Wallace*, 229; *Butler* v. *Horwitz*, Id. 258; *Bronson* v. *Kimpton*, 8 Id., 444; *Hepburn* v. *Griswold*, 8 Id., 603. It thus appearing that the Circuit Court did, on the 3d of June, 1870, pass such decree as it should then have passed, that decree should not now be reversed. For the act of Congress provides expressly that "where a judgment or decree shall be reversed in a Circuit Court, such court shall proceed to render such judgment or pass such decree as the District Court *should have entered or passed;* and *the Supreme Court shall do the same* on reversals therein." 1 Stat., 83, sec. 24; 1 Brightly's Dig., p. 259, sec. 4.

VI. If in respect to decreeing payment in United States coin the decree of the 3d of June, 1870, should be varied or reversed because of any decision of this court made since that day in conflict with its decisions

before that day, it would be most unjust that the appellee Waller should lose his costs on this appeal, and still more unjust that he should have to pay costs to the appellant. It is insisted that there is nothing in the act of Congress or the rules of this court requiring either the one or the other; those rules (No. 24, sec. 3) only providing that "in cases of reversal of any judgment or decree in this court costs shall be allowed to the plaintiff in error or appellant, as the case may be, *unless otherwise ordered by the court.*" Now, here it is submitted that in such a case as is supposed it should be so "otherwise ordered."

Such order will accord well with the principles of equity established by appellate courts in that country, from which we derive our knowledge of those principles. *Kensington* v. *Phillips*, 5 Dow's, P. C., 62; *Taylor* v. *Hossack, &c.*, 5 Cl. and Fin. 397; and in this country in States where those principles prevail. *Rankin* v. *Badford*, 1 Leigh 172; *Lockridge* v. *Sharrot, &c.*, 5 Id. 376; *Early* and *Wife* v. *Friend, &c.*, 16 Grat. 58. Sometimes the costs are divided between the appellants and the appellees. *Taylor's heirs* v. *Whiting, &c.*, 9 Dana 399. Thus, in the House of Lords in 1854, in a case wherein part of the decree of the court below was sustained and part reversed no costs were given to either party. *Torre, &c.*, v. *Browne and others*, 5 Ho. of L. 556. And there has been a like conclusion in some other cases. *Abbott* v. *Middleton. &c.*, 7 Id. 68; the ruling being in one "upon the principle that where there is a difference of opinion in the House there should be no costs." *Monypenny* v. *Monypenny*, 9 Id. 149. But in 1856, although the decree was varied, yet it not being so varied as to the material subject of the appeal, the House of Lords decreed the appellant to pay the costs of the appeal. *Savory* v. *King, &c.*, 5 Id. 628. See also *Re Cork & Youghal R. Co.*, Law Rep., 4 ch. app. cases 748.

CONWAY ROBINSON,

Counsel for Appellee.

Supreme Court of United States.

DECEMBER TERM, 1871.

No. 151.

BIGLER
v.
WALLER'S *adm'r.*

Appeal from decree of Circuit Court of Virginia.

Note on questions from the bench, at the close of the oral argument, March 26, 1872.

In such a case as this, a cross bill is not necessary. *Jennings* v. *Webster*, 8 Paige, 505. If it could have been filed consistently with the regular and approved course of pleading, it would have been a useless formality. *Taylor* v. *Beale &c.*, 4 Grat., 93.

According to the principles of equity as distinguished and defined in that country from which we derive our knowledge of those principles, all the relief which the defendant could have on a cross bill may be had on his answer to the bill of *injunction* which prays, and on which there has been obtained, a decree for an *account.*

Waller had "a clear legal right" to one or the other of two things; to possession as purchaser at the sale made by Saunders in April, 1862; or if that sale was invalid to have such sale made as was contemplated at the time of the advertisement in June, 1866. But Bigler

has prevented either; prevented the former by taking possession in May, 1865, and keeping the same, and taking the rents and profits up to the present time; and prevented the latter by obtaining the injunction which at his instance was awarded in this cause; so that Waller has, by the acts of Bigler, for nearly seven years been deprived of all means of support from either source—the profits of the land or the interest on the purchase money. Such a case is emphatically proper for the application of the principle long and well established in the English chancery, that "the act of the court shall do no harm," 2 Ch. Cas., 217; that the party restrained by its injunction shall be put as near as may be in the same situation in which he would have been if the court had not interposed. Ld. *Eldon*, said in 1801: "If there be a principle upon which courts of justice ought to act without scruple, it is this; to relieve parties against that injustice occasioned by its own acts or over sights, at the instance of the party against whom the relief is sought." He says further, that "if the plaintiff submitted to nothing, *by the mere circumstance of filing the bill he would be taken to submit to every thing conscience and justice require. Upon that principle he would be held to do that which is just, and the court duly acting with him would compel him to pay the principal interest and costs occasioned by his delay.*" Observing, it may be said 'that is a relief given against a plaintiff coming for relief," Lord *Eldon* said: "I consider these persons as plaintiffs asking an injunction and impliedly saying they ask it upon the terms of *putting the plaintiff in exactly the same situation, as if it had been determined, they were not entitled;* for otherwise there is no color of justice calling upon the court to discuss the question whether they are entitled to equitable relief." *Pulteney* v. *Warren*, 6 Ves., 91, 92. This doctrine regarded by Ld. *Redesdale* as unquestionable, (*Bond* v. *Hopkins*, 1 Sch. &

Lef., 434,) was afterwards recognized by Ld. *Manners*. *O'Donel* v. *Browne*, 1 Ball & B., 263. In one of the last cases before Ld. *Eldon*, (March 10, 1827,) he said he entertained "no doubt whatever that if a person indebted in a sum of money by bond, files his bill for an injunction, stating that he is entitled by reason of equitable circumstances to be relieved from the obligation which presses him at law, and there is no neglect or default on the part of the defendant, this court has a right to consider the bond debtor as submitting to do equity when he asks equity; and whatever abstruse and delicate reasoning there may be, as to whether the excess of the debt beyond the penalty is a specialty debt or a simple contract debt, this court will find a way to give execution for the difference," *Grant* v. *Grant*, 3 Russ., 609, 3 Cond. Eng., Ch. R, 539. In 1840, Ld. *Cottenham*, considered "the court ought not interfere for the purpose of preventing a party from enforcing a legal claim without securing to itself the means of putting him in the same position, in the event of his turning out to be right as if the court had not interfered." *Sanster* v. *Foster*, 1 Cr. & Phill., 303, 18 Eng. Ch. R.

Here the bill (p. 5,) not only prayed an *injunction*, but prayed also for an *account* of rents and sales and an inquiry of damage. Accordingly, there was an order for such an account and inquiry, (p. 24;) the court, in making such order, acting perhaps upon the rule of *Lane* v. *Tidball*, Gilm. 132; and *Wilkins* v. *Gordon & wife*, 11 Leigh, 556.* We then have not only the case of an *injunction* to which the principle before mentioned applies, but also the case of a plaintiff, who, "by applying to a court of equity for an *account*, subjects himself to a *decree* for any balance which may be found due from him to the defendant." 2. Rob. Pract., p. 405 of ed. 1835. "For

* See also *Hogan* v. *Duke &c.*, 20 Grat., 253.

it is implied, if not expressed, in the decree to account, that the balance shall be paid to the party entitled." *Bodkin* v. *Clancy*, 1 Ball. & B., 247; 1 Madd., ch. 86. Though a balance was not reported by the commissioner to be due to the defendant, yet, upon exceptions (p. 27,) to his report, the court finding a balance to be due to the defendant and ascertaining its amount, (p. 75,) there is then just as much right to make a decree therefor, and enforce this execution of the decree as there would have been if the commissioner's report had truly shown such balance and been confirmed.

In both aspects—*injunction* and *account*—the subject was well considered in Virginia, in 1871. Recognizing the 'general rule that no person but a plaintiff can entitle himself to a decree,' and its being 'admitted that there are exceptions to this rule,' *Moncure*, P. said: "In a bill in equity for an account, both parties are deemed actors when the cause is before the court upon its merits; and if a balance is ultimately found in favor of the defendant, he is entitled to a decree for such balance against the plaintiff. (1 Story's Eq., § 522.) A plaintiff, by applying to a court of equity for an account, subjects himself to a decree for any balance which may be found due from him to the defendant. (2 Rob. Pr. old ed. p. 405.) This is not the only exception to the rule; but any case falling within the same principle, is, for the same reason an exception to it. This case falls within the same principle. The plaintiff might have filed his bill solely upon the ground that less than twenty days' notice of the sale, as required by the deed, had been given by the trustee; and, upon the admission in the answer of the fact of such defective notice, a sale under that notice would have been perpetually injoined." "But the plaintiff had other grounds of complaint." *Kraker* v. *Shields*, 20 Grat., 395. After

stating those grounds, the judge proceeded thus: "The true relative situation of the parties was reversed by the manner in which the controversy arose. The defendant was the creditor, and was in substance the plaintiff; while the nominal plaintiff was the debtor, and was in substance the defendant in this suit. *The court having adjudicated the controversy and determined that the plaintiff owed to the defendant a certain sum of money and interest, properly rendered a personal decree therefor, notwithstanding the real estate for which the money was due, was also liable for its payment.*" S. C. 396, 396.

In another case, in the same year (1871,) a decree was made "*for the sale of the property and disposition of the proceeds of the sale—in other words for the execution of the trusts of the deed, under the superintendence and by the direction of the court.*" This was deemed proper, "for the reason, if no other, that it appeared from the evidence, that the trustee named in the deed was 'not a responsible man, having lately taken advantage of the bankrupt law.'" *Hogan* v. *Duke, &c.*, 20 Grat., 256.

A like course was proper here, because of the death of Saunders, the trustee, who, but for the injunction, would have sold in 1866. Equity required that the court should put Waller's adm'r, as near as may be, in the situation in which he would have been if the court had not interposed; and the court acted accordingly, when in conformity with its rules, it followed the code of Virginia,* and appointed another trustee. Here we have as parties the personal representive of the trustee and the other persons interested, to wit, Bigler who is to pay and the administrator of Waller who is to receive the money.

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* "In a suit in equity in which it appears, that a trustee has died, although the heirs of said trustee be not parties to the suit, yet, if his personal representative and the other persons interested, be parties, the court may appoint another trustee in the place of him who has died, to act either alone or in conjunction with any surviving trustee, as the case may require," Ch. 178, § 5, p. 675 of Edi., 1849.

After the ground taken in Bigler's answer in New York, p. 83, and the circumstances stated in our brief, p. 7, *et seq*, there is no occasion for any difficulty as to the title to the land. For as stated in that brief, p. 15, "both parties have treated the sale by Saunders in 1862 as invalid; there being a second attempt by Waller to sell under the deed to Saunders, and in this suit an injunction obtained by Bigler to restrain such sale." Although the deed made by Saunders to Waller in 1862 was never recorded, yet if it be thought that regard should be had to the *naked legal title* which may have passed by that deed, this may be sufficiently provided for without reversing the decree or changing its principle. Affirming the decree, and consistently with its principle, the court, in accordance with *Kensington* v. *Phillips*, 5 Dow., P. C. 62, and other cases cited on p. 21 of our brief, may make a variation or addition providing that Henry Coalter Cabell shall defer executing the trust until there shall first be executed by the heirs of William Waller deceased, a deed approved by the Circuit Court as good and sufficient, conveying all the estate that remained in said William Waller at his death in so much of the land embraced in the deed of trust to Saunders as has not been by Bigler with said Waller's consent heretofore sold; in trust that if the whole amount of principal interest and costs payable to Waller's administrator, shall be paid by Bigler, or some one for him, before the expiration of the sixty days mentioned in the decree, such estate shall be conveyed by said Cabell to said Bigler; otherwise such estate shall pass by said Cabell's conveyance to the purchaser or purchasers at the sale under the decree.

CONWAY ROBINSON,

March 28, 1872. *Counsel for Appellee.*